Central Law Journal.

ST. LOUIS, MO., DECEMBER 17, 1897.

On page 494 of this issue will be found the opinion of Judge A. M. Thayer, for the United States Circuit Court of Appeals, Eighth Circuit, in the case of Hopkins v. The Oxley Stave Co., to which we called attention in our last number, involving the question of the legality of the boycott. Our readers will doubtless find it well worth a careful perusal. The conclusion of the court is undoubtedly the correct one, and is in strict consonance with well-established, legal and constitutional rights.

While on the subject of boycott it may be well to call attention to another recent important decision, by the Supreme Judicial Court of Massachusetts—Hartnett v. Plumbers' Supply Assn. of New England, 47 N. E. Rep. 1002—wherein was involved an attempt to coerce an alleged debtor into paying a disputed bill through procuring suspension of his credit among persons in the same line of business with the alleged creditor. The action was against a co-operative association to which the alleged creditor belonged, and which, as matter of fact, was incorporated under the laws of Massachusetts. It was composed of dealers in plumbers' supplies and was organized under an act relating to "associations for charitable, educational and other purposes," for the avowed purpose of "promoting pleasant relations among its members, discussing, arbitrating and settling all matters pertaining to the prosperity and promotion of the jobbing plumbers' supply business, and establishing and maintaining a place for social meetings." It seems, however, that the association devised a plan for compelling the payment of debts alleged to be due to its members from their customers by obligating all members to refuse to make sales on credit to any person who had been complained of as delinquent by a member. The opinion calls attention to the fact that the ability to purchase on credit is a very valuable factor in the business life of many persons. If such power be invaded, wantonly or without full legal justification, the courts certainly should supply a remedy. The abuses to which such co-operative machinery might be put are illustrated by the circumstances of the present case, in which it appeared that the petitioner, being a customer of a member from whom general credit had been suspended through the order of the association, had paid part of the original claim, and that liability for the balance was, at the time of the complaint to the association, actually a subject of litigation in the courts. The operations of this anti-credit syndicate would thus obviously afford a very effectual method of ousting courts of jurisdiction and compelling customers of members to pay unjust claims. The Massachusetts court decided against the right of the corporation to pursue the plan in question, and against the legality of what was essentially a conspiracy to coerce persons through a species of business duress.

A recent English case which has been the subject of special comment in the English law periodicals is Reg. v. Starmouth, involving criminal liability for causing death by suicide. A similarity between that case and the old case of Reg. v. Alison, 8 C. & P. 418, has been noted. In each case a man and a woman had agreed to die; poison was obtained, they divided it, drank it, and lay down together to die; but the woman alone died, whilst the man recovered and lived to be indicted for her murder. In the reported case Patteson, J., held on the facts that in law the prisoner was guilty of murder, and he was accordingly convicted. In a more recent case, Reg. v. Jessop, 16 Cox, 204, the facts were again practially the same, though in this case both the persons who agreed to die together by poison were young men. Field, J., before whom the survivor was tried for the murder of his friend, in summing up to the jury, said: "A person who administers poison to another with the intention of killing him is guilty of murder if that person dies, and if two persons agree that they will each take poison, each person is a principal and each is guilty." The prisoner was convicted in this case also, and neither decision has ever been seriously questioned. At one time a person who counseled, aided, or abetted another to commit suicide, but who was not present when the *felo de se* put an end to his life, was in the position of an accessory be-

fore the fact to murder. An accessory before the fact, however, could not at common law be tried until the principal felon had been convicted, unless he were tried along with the principal. Hence it followed in such a case that the accessory to the felony of self-murder escaped punishment, as it was not possible to try the principal. The law on the subject has, however, been altered by section 2 of 24 & 25 Vict. ch. 94, which provides that an accessory before the fact to any felony may be indicted and convicted as such, "whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice." If, however, as in the cases noticed, a person aids or abets another in committing suicide, and is actually present when that other takes his own life, he is guilty of murder at common law as a principal in the second degree. And as principals in the second degree and accessories before the fact are all in law equally guilty with the principal in the first degree, it follows that anyone who aids and abets another in the crime of suicide is in law guilty of murder and liable to the penalty of death.

NOTES OF RECENT DECISIONS.

OFFICERS—UNOFFICIAL ACTS—FEES—CONTRACT.—In Studley v. Ballard, it is held by the Supreme Judicial Court of Massachusetts, that the obtaining of information respecting violations of the liquor law before filing complaints is outside the line of the duties of deputy sheriffs, and for which the law allows no fee; and hence a contract with such officers to pay them for labor, time, and outlay spent for such a purpose is legal, and sustained by a sufficient consideration. The court says that "the rule of law is simple. A contract to pay an officer for doing his official duty, or to pay him a sum in addition to his statutory fees, cannot be enforced. Pool v. Boston, 5 Cush. 219; Brophy v. Marble, 118 Mass. 548; Hatch v. Mann, 15 Wend. 44. But a contract is good to pay him for services outside the line of his duty, for which the law allows him no fee. Davis v. Munson, 43 Vt. 676; Trundle v. Riley, 17 B. Mon. 396; England v. Davidson, 11 Adol. & E. 856. In Shattuck v. Woods, 1 Pick. 171, 175, it is said that, if an officer returns an execution unsatisfied by consent of the creditor, and has incurred any expense, he must look to the creditor for his recompense."

INNKEEPER'S LIEN — PROPERTY OF THIRD PERSON.—In Brown Shoe Co. v. Hunt, 72 N. W. Rep. 765, decided by the Supreme Court of Iowa, it was held that a lien given by a statute of Iowa to hotel keepers, on all property "belonging to or under the control of their guests, which may be in such hotel," etc., attaches to sample goods carried by a traveling salesman, though the hotel keeper knows, when he receives the salesman as a guest, that the goods belong to his employer. It was further held that such statute is not unconstitutional as depriving the actual owner of his property, without due process of law, since it makes no provision as to how the lien shall be enforced. The court said in part:

Our statute provides: "All hotel, inn or eating-house keepers shall have a lien upon, and may take and retain possession of all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn or eating-house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the proper and reasonable charges of such hotel, inn or eating house keeper against such guest, and the costs of enforcing the lien thereon." Acts 18th Gen. Assem., ch. 181, sec. 2. It appears from the statement of facts that defendant knew that the goods upon which he claims a lien did not belong to his guest, but were the property of the plaintiff. It is, therefore, contended that his innkeeper's lien did not attach to them. Counsel cite several cases in support of such contention. They were cases where the lien claimed was the common-law lien, and not one created by the statute. This applies also to the claim that the goods were not of such a character as to be considered as for the convenience or comfort of the guest, but rather such as enable the guest to carry on a trade or business. The common law doctrine that the innkeeper could have no lien as against the property of the third parties, he knowing their ownership when he received the guest and the property, has been changed by our statute. Under our statute, the innkeeper may "take and retain possession of all baggage and other property belonging to or under the control of their guests, which may be in such hotel or inn." Clearly, the legislature intended by the words used to give a lien, not only upon the property in fact belonging to the guest, and which was in the hotel or inn, but likewise a lien upon property placed therein which was under the guest's control. The guest in this instance was a traveling man, selling goods by sample, and the lien is claimed upon these sample goods and the receptacles in which they were contained. These goods were used in the prosecution of

his business as a salesman. The nature and character of his occupation were such that plaintiff must be held to know he would be compelled to stop at hotels or inns, and that, in the proper prosecution of his avocation, he would need his sample goods in such hotels or inns. The statute clearly covers such goods as they were, under the control of the guest.

The statute is not unconstitutional. It does not deprive the owner of his property without due process of law. It simply provides for a lien and a possession, and makes no provision as to how the lien shall be enforced.

ESTOPPEL IN PAIS—ASSIGNMENT FOR BENEFIT OF CREDITORS. — The Supreme Court of Tennessee says in Lockett v. Kinzell, that creditors are not estopped to assail an assignment void in law upon the bare ground that, without any change of attitude either on the part of themselves or other beneficiaries, or of the assignee, towards the trust property, and in the absence of aggressive steps to enforce rights under the assignment, they indicated in correspondence and conversations their purpose to take under such assignment, no benefit having accrued to them, and the trust estate or assignee not being placed at disadvantage by them. The court says:

The complainants are creditors of Kinzell & Co., who in June, 1896, undertook to make a general assignment, which was confessedly fraudulent in law; and the bill in this cause sought to impeach this instrument, and, by attachment, to appropriate the property covered by it, as far as need be, to the various debts of the complainants. As to all but two of these complainants, the defendants relied upon their conduct, as raising an equitable estoppel to prevent a recovery. The facts relied on for this purpose are briefly as follows: In October, 1896, the solicitors of all the complainants (except the two against whom this rule is not invoked) addressed a letter to the assignee of the insolvent firm, in which they stated to him that they held for collection a large part of the claims protected by the assignment; that some of their clients had spoken of filing a bill in the chancery court to wind up the trust, but that, if he (the assignee) was making proper progress, they (the writers) were not inclined to interfere with him. In order that they might be informed with regard to the condition of the matters in his hands as assignee, they requested him to call at their office for an interview. A few days thereafter these gentlemen addressed a second letter to the assignee, in which they reminded him with some severity that he had failed to call in answer to their request. Then, giving him the names of the creditors represented by them, they said that they were directed to demand an immediate settlement, and, in the event it was not made, to take steps to enforce it. They again asked him to call, and let them know what his purpose was. Soon after this letter was sent, the attorney of the assignee called upon these gentlemen, and asked them if he was to consider their debts as filed. To this they replied he might so consider them. Subsequently the assignee, through his attorney, announced to one of these solicitors his readiness to pay the *pro rata* due his clients; but this gentleman declined to accept payment, because his partner, who had personal charge of this matter, was then out of the city. At this juncture this court declared the "General Assignment Act" of 1895, under which the assignment in question was prepared, to be unconstitutional. The effect of this decision was to leave chapter 121 of the Acts of 1881 as the law regulating general assignments in this State, and as the instrument in question failed altogether to comply with the essential requirements of that statute, under the settled rule of this court, it was open to successful attack upon the part of dissatisfied creditors of the grantors, as fraudulent in law. Immediately thereafter the present bill was filed.

The question is: Do the foregoing facts work an estoppel on such of complainants as were represented in these negotiations by these solicitors to impeach this assignment, though fraudulent in law as to all creditors of the assignors? It will be observed that no benefit accrued to these complainants as the result of these negotiations between their solicitors and the assignee. Nor was the trust estate or the assignee placed at disadvantage by them. If estopped at all, it is upon the bare ground that without any change of attitude upon the part either of complainants or of other beneficiaries or of the assignee toward the trust property, and in the absence of affirmative or aggressive steps to enforce rights under the assignment, they indicated in this correspondence and these conversations their purpose to take under the assignment. That a fraudulent transfer may be ratified by a creditor, so as to preclude him from attacking it, is well settled, but we have not had our attention called to any case where this result has followed from facts so meager as these. Where a benefit has been received by the creditor from the fraudulent transfer; or where the assignee, by reason of the assailing creditor's conduct or agreement in recognition of it, has been put at disadvantage; or where such creditor enters into an arrangement with the other creditors of the fraudulent grantor looking to a disposition of the assigned property, and distribution of its proceeds among all (3 Bump, Fraud. Conv. p. 6, §§ 456, 457); or where he takes legal steps to enforce the assignment; or where he does anything else unequivocal and decisive in character (O'Bryan v. Glenn, 91 Tenn. 106, 17 S. W. Rep. 1030), he would be held to have estopped himself from attack upon it. But, as was said by the Supreme Court of New York in Groves v. Rice, 148 N. Y. 227, 42 N. E. Rep. 664, "in order that a creditor shall be estopped by an act of his from impeaching the validity of an assignment, it must appear that he has accepted an actual benefit under it, or that he has assumed such an attitude as would be inconsistent with his taking such a position" This rule, thus announced, will be found illustrated in Hone v. Henriquez, 13 Wend. 240; Hays v. Heidelberg, 9 Pa. St. 207; Adlum v. Yard, 1 Rawle, 163; Ingram v. Hartz, 48 Pa. St. 380; and in Rapalee v. Stewart, 27 N. Y. 310. In the first four of these last cited cases the creditor was held estopped because he had obtained benefits from the transfer afterwards assailed by him. In the last (Rapalee v. Stewart, *supra*), the contributing creditor had entered into an agreement with the other creditors showing an assent to and ratification of the assignment, by which the parties to it consented and agreed that certain other persons, one of them being the assignor debtor, should be joined in the disposition of the property assigned. It is apparent that these cases fall short of being authority for the contention that is made in the present case; nor is it sustained by Swanson v. Tarkington, 7 Heisk. 612, and August v. Sees-

kind, 6 Cold. 166, cited for that purpose. The first of these cases simply held that, in claiming under a trust assignment, a creditor affirmed it *in toto;* while the second only announced the well-settled rule that in the absence of a reformation of an assignment which, by the inadvertence of the draftsman, contained a clause making it fraudulent in law, creditors claiming under it are held to the terms as written in it, and that the grantors, as against creditors assailing it, will not be permitted to say it is not in fact what they intended it to be. If the contention of the defendants is sound, these complainants, acting in good faith, and without inflicting wrong upon the trust estate or having acquired the least advantage, had, by an inadvertence, tied their own hands; so that they must look on, without power to protect themselves, while more fortunate creditors, upon the discovery that the assignment is fraudulent in law, fix their attachments upon the property, and appropriate its proceeds. On the whole case, we think neither on principal nor on authority ought the complainants to be repelled, and that the court of chancery appeals was in error in holding that they were. So much of the decree of that court as holds that certain of these complainants were estopped is reversed, and a decree will be entered here in favor of all the complainants.

CARRIERS OF PASSENGERS — MERCHANDISE CARRIED AS BAGGAGE—KNOWLEDGE ON PART OF CARRIER.—The Supreme Court of Ohio decides, in Toledo & O. C. Ry. Co. v. Doges, 47 N. E. Rep. 1039, that although a common carrier of passengers is under no obligation to carry articles of merchandise as baggage, and although it is not liable for the loss of such merchandise, if it is tendered to and received by it as baggage without actual knowledge of its true character, yet if it receives and checks merchandise as baggage with actual knowledge on the part of its agents that it is merchandise, it thereby waives its right to immunity from liability because of the character of such articles. The court says:

Much of the doctrine maintained by counsel for the carrier is established law. The obligation of the carrier to carry the baggage of a passenger is limited to those articles which are for his personal comfort and convenience. Nor is the carrier bound to inspect a trunk presented by a passenger as baggage, to see whether it contains articles of merchandise. In the absence of knowledge to the contrary, it may rely upon the passenger's implied representation that its liability will be limited to baggage. Since it does not owe the duty of inquiring as to the contents of such trunks as are so presented, it cannot be charged with knowledge which inquiry might have elicited. Nor can the liability of the carrier be extended by the fraud and deceit of the passenger. A claim founded on his own fraud and deception would be as bad in law as it is in morals. But it does not appear from these records that any of these views were denied by the common pleas court of Franklin county, or by either of the circuit courts. It cannot be said that one is deceived or defrauded with respect to facts which are made known to him in any way. In two of these cases the jury were instructed that, to charge the carrier with liability for the merchandise as baggage, it was necessary to show that its agents knew the character of the contents of the trunks when they received and checked them. In the other case the evidence tended to show that the agent had such knowledge. The instruction given placed upon the plaintiffs the burden of proving such knowledge. The instruction was not that the carrier would be liable if its agents might have known that the trunks contained merchandise, or if they had reason to know; for that would have defined a rule too uncertain of application. The charge required that the evidence, circumstantial and direct, must affirmatively show that the carrier's agents knew that merchandise was received to be carried as baggage. That such knowledge fixes upon the carrier the same liability for merchandise accepted to be carried as baggage as though it were baggage is generally, though not universally, held. The general rule upon the subject of waiver as affecting the liability of the carriers was stated by Mr. Justice Field in Railroad Co. v. Swift, 12 Wall. 262, as follows: "If at any time reasonable ground existed for refusing to receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If, not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed." In 3 Wood, R. R. p. 1806, it is said: "While a carrier is not obliged to accept anything but ordinary baggage as baggage, yet if, without extra compensation, and knowing that it is not personal baggage, he permits it to be treated and carried as such, he is liable for its loss." The same doctrine was declared and applied in Jacobs v. Tutt, 33 Fed. Rep. 412, and in numerous cases cited in the briefs. Nothing opposed to this view is held in Humphreys v. Perry, 148 U. S. 627, 13 Sup. Ct. Rep. 711, relied on by counsel for the company; for not only does the court, by distinguishing Jacobs v. Tutt, recognize that case as correctly decided, but in the opinion it is stated as a reason for the conclusion that the carrier was not liable for the value of merchandise received to be carried as baggage that the witness "testified to no fact from which the inference could be drawn that the agent had actual knowledge that the trunk contained a stock of jewelry." Nor is the view stated in conflict with the cases in which it is held that the carrier does not become liable for merchandise received as baggage merely because it had frequently so received it, nor merely because of the peculiar appearance of the trunks or cases in which it was contained, for fraud cannot be practiced upon a carrier so frequently as to create a cause of action against it; nor is proof of a circumstance which tends to show knowledge, or which might excite a suspicion, necessarily equivalent to proof of actual knowledge. Concerning the effect of such circumstances, it was said by this court in Johnson v. Way, 27 Ohio St. 374, as a reason for rejecting the ancient rule that there could be no recovery upon a negotiable instrument void between the original parties if the holder had acquired it under circumstances calculated to excite suspicion: "Circumstances which might excite the suspicion of one man might not attract the attention of another. It is a rule which business men cannot act upon in the ordinary affairs of life with any certainty that they are safe." It was nevertheless held that good faith required the holder to act upon his knowledge. It is true that in cases not distinguishable from those before us the Supreme Court of Massachusetts has ex

empted the carrier from liability for the merchandise, holding that, notwithstanding its knowledge of the character of the articles to be carried, it is liable only according to the terms of its contract, and that the articles of merchandise were carried at the risk of the passenger. If we were inclined to adopt this view instead of that which obtains generally, we should find difficulty in distinguishing Express Co. v. Backman, 28 Ohio St. 144, where a common carrier of freight was charged with the consequences of its knowledge that the value of the freight exceeded that which was stated in the bill of lading. It would not seem practicable, in this respect, to distinguish between the carriage of freight and the carriage of baggage, nor between knowledge of the value of the articles carried and knowledge of their character. In one case as clearly as in the other considerations of public policy justify the conclusion that, if the carrier, for the purpose of obtaining patronage, and with actual knowledge of all the material facts, waives its right to refuse merchandise which it is requested to carry as baggage, or to make an additonal charge commensurate with the increased risk, it cannot, after a loss has occurred, assert an immunity from liability because of such right.

RELEASE AND DISCHARGE—AVOIDANCE FOR FRAUD — RETURN OF CONSIDERATION.—Whether one, from whom a release has been obtained by fraud, must return or tender back the consideration received in order to entitle him to rescind, has been more or less a debatable question, the authorities on the subject being at variance. In a recent Indiana case—Citizens' St. R. Co. v. Horton, it was held that where defendant in an action for personal injuries procures by fraud a dismissal of the suit, and settlement of the damages with plaintiff, the latter cannot go on with the suit without paying or tendering to defendant the money received in consideration of such settlement. The court says:

The controlling question on this appeal is: "Was it necessary for appellee to pay or tender back to appellant the sum of money ($150) paid to her by appellant as the consideration for the alleged settlement of the action, before she could proceed any further?" Appellant contends for the affirmative of this proposition, and that the demurrer to the reply should have been sustained for the reason that it does not allege an avoidance of the contract of settlement set up in the second paragraph of answer. Appellee contends that the tender back or repayment of the money paid as the consideration of the settlement was not necessary before proceeding with the action. It is the law in Indiana that defective contracts are either void or voidable. Contracts made with persons after they have been adjudged insane are absolutely void. The adjudication has no less force before than after the appointment of a guardian. Redden v. Baker, 86 Ind. 191. Contracts with infants, weak minded people, married women under certain circumstances; contracts induced by fraud, mistake, misrepresentations, and deceit,—are voidable only. They may be avoided by the maker or his representative. Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. Rep. 80. A contract entered into under the conditions set up in the reply has been declared, under numerous decisions of the supreme court of this State, to be voidable. See *vide*, Keller v. Insurance Co., 28 Ind. 170; Boyer v. Berryman, 123 Ind. 451, 24 N. E. Rep. 249; Peck v. Vinson, 124 Ind. 121, 24 N. E. Rep. 726; McMillan v. William Deering & Co., 139 Ind. 70, 38 N. E. Rep. 398, and decisions therein cited. When a party has entered into a voidable contract, and wishes to be restored to the rights he possessed before the contract was executed, he must promptly disaffirm the contract. 2 Pom. Eq. Jur. § 897, upon the subject of disaffirmance, reads as follows: All these considerations as to the nature of the misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit and relief from misrepresentations." These principles have been applied by the supreme court of this State to voidable contracts. Parks v. Railroad Co., 23 Ind. 567; Patten v. Stewart, 24 Ind. 332; Hanna v. Shields, 34 Ind. 84; De Ford v. Urbain, 48 Ind. 219.

In Heaton v. Knowlton, 53 Ind. 357, a promissory note had been procured by false and fraudulent representations. It was held that the party defrauded could not rely on the fraud as a defense in an action on the note if, as the consideration of the note, he received anything of value which he did not restore or offer to restore. The court speaking by Buskirk, J., said: "The conclusion at which we have arrived renders it unnecessary for us to decide whether the representations found by the jury to have been made amounted to such a fraud as would vitiate the contract. Conceding that the contract was procured by false and fraudulent representations, the party defrauded cannot rely upon such fraud as a defense unless he has rescinded the contract, and offered to restore whatever of value he has received. A party cannot repudiate a contract on the ground of fraud, and at the same time retain the benefits derived from it, but must, when he discovers the fraud, restore or offer to restore to the other party what he received; and, failing to do this, he affirms the contract. When the consideration received is of any value to either party, its return must be tendered before the party can sustain an action for rescission of the contract, or successfully defend an action based upon such contract. A party to a contract cannot treat it as good in part and void in part, but he must affirm it or avoid it as a whole; nor can a contract, either for mistake or fraud, be rescinded in part and affirmed in part, but must be rescinded *in toto* or not all,"—citing Shaw v. Barnhart, 17 Ind. 183; Shepherd v. Fisher, *Id.* 229; McGuire v. Callahan, 19 Ind. 128; Johnson v. Houghton, *Id.* 359; Love v. Oldham, 22 Ind. 51; Cain v. Guthrie, 8 Blackf. 409; Fisher v. Wilson, 18 Ind. 133; Stewart v. Ludwick, 29 Ind. 230; Johnson v. Cookerly, 33 Ind. 151; Joest v. Williams, 42 Ind. 565. We think it may be regarded as settled in this State that a party claiming to be defrauded into the signing of a contract and agreement, and having received

something of value for the execution of the alleged contract, cannot ignore the same, and proceed in the assertion of his original rights as if such contract had not been made, without disaffirming such contract, and substantially restoring or offering to restore the *status quo*. Mining Co. v. Casteel, 68 Ind. 476; Cates v. Bales, 78 Ind. 285; Johnson v. Culver, 116 Ind. 278, 19 N. E. Rep. 129; Insurance Co. v. Howard, 111 Ind. 544, 13 N. E. Rep. 103; Thompson v. Peck, 115 Ind. 512, 18 N. E. Rep. 16; Westhafer v. Patterson, 120 Ind. 459, 22 N. E. Rep. 414; Insurance Soc. v. Girton, 124 Ind. 217, 24 N. E. Rep. 984; Insurance Co. v. McRichards, 121 Ind. 121, 22 N. E. Rep. 875; Railway Co. v. Herr, 135 Ind. 591, 35 N. E. Rep. 556; Protective Union v. James, 8 Ind. App. 449, 35 N. E. Rep. 919. This principle applies equally to a case of contract made in settlement of contractual disputes and the adjustment of rights growing out of torts. There is no better reason why parties having a defense to an antecedent tort shall not make settlement of such defense than if such defense grew out of a contract. Nor is there is any better reason why in the one case having made an agreement of settlement, and having received something of value in consideration for the same, either party should be permitted to repudiate the settlement and stand upon his antecedent rights without restoring the *status quo* in one case than in the other. A large proportion of controversies arise between individuals having a choice of actions either to waive the tort and sue in contract or sue in tort. In Railway Co. v. Herr, *supra*,—an action for a personal injury by appellee against appellant,—a contract of settlement had been made, and the court held a reply to an answer setting up such settlement, which failed to show a rescission and restoration of *status quo*, bad. While the word "fraud" is not used in the pleading, it was agreed that the alleged settlement was made and receipt procured from the appellee when he was *non compos mentis*, and when the appellant well knew that he was *non compos mentis*. When a party goes into court in an equitable suit to rescind, it is sufficient if he brings into court that which was received, and the return of which is necessary to the restoration of the *status quo*, but the case at bar is an action at law upon an original alleged liability. There is an answer of compromise and settlement, and reply averring that such compromise and settlement was obtained by fraud, but not denying the receipt of the money in consideration of the settlement, and neither alleging restoration nor offering to restore the same. Such allegations would not be sufficient in a direct proceeding in equity for rescission. In the case at bar the court erred in overruling the demurrer to the reply.

Counsel for appellee, in their able brief, argue with earnestness and ability, and cite a number of authorities in support of the negative of the proposition here presented. At the risk of unduly extending this opinion, these authorities will be considered. O'Brien v. Railway Co., 57 N. W. Rep. 425, is a case strongly relied upon by appellee, and supports her position. It is a decision of the Supreme Court of Iowa. It appears from the opinion that the decisions in that State are in conflict on this question. The opinion, on page 427, quotes from the case of Kley v. Healy (N. Y. App.), 28 N. E. Rep. 593, as follows: "'A more satisfactory answer, however, may be found in the principle that one who attempts to rescind a transaction on the ground of fraud is not required to restore that which, in any event, he would be entitled to retain, either by virtue of the contract sought to be set aside, or of the original liability.'" And, following the quotation, the Supreme Court of Iowa says: "This principle commends itself as eminently just. Applying it to the facts in the case at bar, we may well inquire, why should the plaintiff tender to the defendant that which the plaintiff was entitled to retain even if defeated in the action? In that event he would retain the $250 [the amount paid in settlement] by virtue of what the defendant contends is a valid transaction. When the court directed the jury that, if the plaintiff was entitled to recover, the sum paid at the alleged settlement should be deducted from the verdict, it was, in effect, a return of the money paid for the release." Kley v. Healy, *supra*, was an action to set aside a judgment in favor of the plaintiff, and the language so quoted was used with reference to that fact. There was no dispute that the judgment was valid, and that the amount shown upon its face was due. The judgment defendant had procured the judgment plaintiff to execute a release thereof by false representations, and as a part of said transaction had paid a part of the costs; and the court correctly said that, in any event, the judgment defendant was liable for the face of this judgment and the costs, and that, therefore, he had not paid anything that he was not bound to pay, and therefore had no right to have repayment before action brought for the fraudulent representation. In the Iowa case a brakeman sued his employer for negligence causing him personal injury. The liability was not admitted, but denied. In the case at bar the liability is denied. With deference to the learned court from whose opinion we have just quoted, we think the case of Kley v. Healy, *supra*, is not analogous to O'Brien v. Railway Co., *supra*, and gives it no support. In the case at bar two issues were for trial: First. Was the appellee injured under such circumstances as to entitle her to damages from the appellant? Second. Was the settlement made under such circumstances that it ought to be set aside? If the last issue had been found in favor of plaintiff, and the first issue in favor of the defendant, the plaintiff would have $150 of defendant's money without right; and, if she were insolvent, the defendant would be without remedy. The doctrine of the Iowa case must rest upon the proposition that, when an action is brought for damages for personal injuries, or is threatened to be brought against an individual or a corporation, and a compromise is made, and money paid to avoid litigation, the courts will conclusively presume that such party was bound to pay at least as much as was paid. This is against the accepted policy of the law that no party in making a compromise shall be deemed as admitting a cause of action, because the law favors the avoidance of litigation by compromise. In some of the cases cited in appellee's brief the respective plaintiffs claimed, and gave evidence in support of such claim, that the money received was not received in compromise and settlement of the damages, but for some other purpose, such as wages, loss of time, loss of property, as gratuity, etc. To this effect are the following cases: Mateer v. Railway Co. (Mo. Sup.), 15 S. W. Rep. 970, in which case plaintiff's testimony was positive that the $300 paid him was for loss of time, and not in settlement of his claim for damages. In Shaw v. Weber (Sup.), 29 N. Y. Supp. 437, it was claimed that the money received was a gratuity given by defendant's wife to plaintiff. In Sobiesky v. Railroad Co., 41 Minn. 169, 42 N. W. Rep. 863, and Vautrain v. Railway Co., 78 Mo. 44, the amounts were paid as wages, not in settlement of claims for damages. In Railway Co. v. Welch, 52 Ill. 183, the money was paid for loss of time, and not in settlement. The law on this subject

and the distinctions are clearly stated in the case of Mullen v. Railroad, 127 Mass. 86, being one of the cases cited in O'Brien v. Railway Co., *supra*. The Massachusetts court says: "It is well established that if a party enters into a contract, and in consideration of so doing receives money or merchandise, and afterwards seeks to avoid the effect of such contract as having been fraudulently obtained, he must first give back to the other party the consideration received. Coolidge v. Brigham, 1 Metc. (Mass.) 547; Estabrook v. Swett, 116 Mass. 303. And if, after accepting a certain sum in settlement of an unliquidated claim for damages under a contract, one seeks to pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, he must first repay the amount received. Brown v. Insurance Co., 117 Mass. 479. The principle upon which these decisions rest is just; but it applies to those cases only where that which was received, and which must be returned, was the consideration of the contract or settlement which the receiver intended to make, and understood that he was making, and which he seeks to avoid by reason of fraudulent practices of the other party which led him to agree to its terms. It does not apply to cases where a party holds out that he gives the consideration for one thing, and by fraud obtains an agreement that it was given for another thing." In the following cases, cited by appellee, the question of restoration to *status quo* was not raised: Bussian v. Railway Co., 56 Wis. 325, 14 N. W. Rep. 452; Conner v. Chemical Works (N. J. Ch.), 17 Atl. Rep. 975; Packet Co. v. Defries, 94 Ill. 598; Webb v. Steele, 13 N. H. 230; Dixon v. Railroad Co., 100 N. Y. 170, 3 N. E. Rep. 65; Sobieski v. Railroad Co., 41 Minn. 169, 42 N. W. Rep. 863; Railway Co. v. Welch, 52 Ill. 183; Schultz v. Railway Co., 44 Wis. 638. In Girard v. Car Wheel Co., 46 Mo. App. 79, a portion of the consideration received in settlement was not paid back, and the court says: "It is not the law that a party who has been induced by the fraud of the other party to release his right of action against the latter must restore the consideration which he has received for the giving of the release in order to entitle him to set up the fraud in avoidance of the release for an action upon the cause of action thus released. Railroad Co. v. Lewis, 109 Ill. 120. It is true, as a general proposition of law, that one who is induced by fraud to enter into a contract with another must, within a reasonable time after discovering the fraud, notify the other party of its rescission, and restore to him whatever consideration he has received under it. But he is not bound to restore to the other party what he has received under it, where the other party is indebted to him in a larger amount." The reasoning is along the line of O'Brien v. Railway Co., *supra*. An examination of the case of Railroad Co. v. Lewis, *supra*, will show that the evidence tended to show that the money received, and which was not tendered back, was not received in settlement, but was paid for loss of time and expenses incident to the delay resulting from the accident. It does state that, if a release was obtained by fraud at a time when plaintiff was incompetent to contract, it was absolutely void as between the parties, and will not stand in the way of an assertion of any right by the party defrauded. Our supreme court holds the reverse, as the decisions heretofore cited show. The case of Girard v. Car Wheel Co., *supra*, and O'Brien v. Railway Co., *supra*, assumed the matter in dispute. They assume that whether there was an indebtedness was not an open question. In Railroad Co. v. Doyle, 18 Kan. 58, a reply avoiding the release stated that the plaintiff, if he executed the release, did so under the belief that it was a receipt for wages. The language of the court, however, is broader than the reply called for, and may be said to sanction the doctrine as declared in O'Brien v. Railway Co., *supra*.

An examination of the cases cited by appellee leads us to the conclusion that most of them are distinguishable from the case at bar, and that most of these which are not are contrary to the decision of our supreme court, and are unsound in principle.

POWER OF MUNICIPALITY TO DECLARE WHAT CONSTITUTES A NUISANCE.

1. General Principles.
2. General Rule—Nuisance, *per se*.
3. City may Declare Nuisance, when—Illustrations.
4. True Doctrine Stated—Illustrations.
5. Courts are Reluctant to Interfere—Reasonableness.
6. Doubt as to Nuisance.

1. *General Principles.*—In addition to their general police powers, most cities have the express power granted to them by their charter or organic law to declare, prevent, and abate nuisances within the city limits. This authority has been productive of much discussion, and opinions more or less conflicting. Ordinarily, nuisances are declared, prevented, and abated by virtue of by-laws or ordinances passed in conformity with the charter power or authority conferred by general statutes. Frequently, the board of health or the health department is given discretion more or less limited over particular nuisances. In considering this subject, it is well to bear in mind, that ordinances relating to the suppression or abatement of nuisances are treated as police regulations.[1] Generally, cities are given ample authority by State statute or charter to maintain their cleanliness and the health of their inhabitants, to establish and maintain good sanitary conditions within their corporate limits; to suppress all nuisances, and to impose fines and imprisonment for the violation of ordinances and by-laws created in pursuance of this general power. Much discre-

[1] First Nat. Bank v. Sarlls, 129 Ind. 29; Hasty v. Huntington, 105 Ind. 540; Salem v. Maynes, 123 Mass. 372; Klinger v. Bickel, 117 Pa. St. 326; City of Tarkio v. Cook, 120 Mo. 1; St. Louis v. Weber, 44 Mo. 547; St. Louis v. Jackson, 25 Mo. 37; St. Louis v. Russell, 116 Mo. 248; St. Louis v. Howard, 119 Mo. 47; Kansas City v. Neal, 49 Mo. App. 72; Lawton v. Steele, 119 N. Y. 226, 16 Am. Dec. 381; Mugler v. Kansas, 123 U. S. 661; Wynehawer v. People, 13 N. Y. 378; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

tion is vested in the municipality in the exercise of its police powers, such as determining what is and what is not a nuisance; and the discretion thus exercised will not be judicially interfered with unless the corporation has been manifestly unreasonable and oppressive, invaded private rights and transcended the powers granted to it.[2] Every city may, to a limited extent, prescribe the manner of exercising rights over property within its borders. The power rests upon the implied right and duty to protect all by proper restriction, to the end that, on the whole, the benefit of all is promoted. Every public regulation in a city may, and does, to a certain extent, limit and restrict the absolute right that existed previously, but this cannot be considered an injury; far from it, the individual is presumed to be benefited. It must be conceded that city authorities have the right to regulate the use of private property within the city, so as to prevent its proving pernicious to the health and comfort of the citizens generally or injurious to certain classes of property and business within the city, otherwise we would strike at the very foundation of police regulations. Every right, from an absolute ownership in property down to a mere easement, is purchased and holden, subject to the restriction, that it shall be exercised so as not to injure, inconvenience or discommode others.[3] "The plenary authority of the law-making power to provide for the preservation of public health, and to protect the citizen in his natural rights to the enjoyment of pure air, has too long been firmly fixed in our jurisprudence to require discussion."[4] It is within the discretion of the municipal authorities to enlarge the category of public nuisances, subject to the limitations already indicated. They may declare places or property used to the detriment of public interests, or to the injury of the health, property, business, morals or welfare of the community, public nuisances, although not such at common law.[5]

2. *General Rule — Nuisance per se.*—The general rule is stated in many text books and decisions to be that a city has no authority to declare that a nuisance which is not so in fact.[6] Under this rule, some decisions would appear to limit the inquiry as to what is a nuisance to those things which have been regarded so at common law or have been declared such by statute. Many decisions hold that where a city has power to determine what constitutes a nuisance, and it declares that a particular thing is a nuisance, such determination is conclusive of the question.[7] It has been held, and it is doubtless the true rule, that where a particular thing declared against is a nuisance *per se* the action of the city authorities is conclusive.[8] "It appears to be settled that when the legislature delegates to certain municipal agents a general power to provide for the preservation of the public health by the removal of nuisances, an adjudication by such agents upon the facts of such nuisance existing within their local jurisdiction is conclusive; at least in every case where the subject-matter comes within the classification of *prima facie* nuisances or nuisances *per se*.[9]

3. *City may Declare Nuisance, When—Illustrations.*—The Supreme Court of Louisiana held that where the city of New Orleans had conferred upon it by its charter the general power to declare what constitutes a nuisance, an ordinance declaring that smoking in a street car is a nuisance is constitutional and valid.[10] Likewise, an ordinance prohibiting the cultivation of rice within the corporate limits of a city has been held valid, as a po-

[2] Dillon on Municipal Corporations, sec. 379; Hart v. Mayor, etc., 3 Paige, 213; Mayor, etc. v. Gerspack, 33 La. Ann. 1011.

[3] Baker v. Boston, 12 Pick. 193, 194; Vanderbilt v. Adams, 7 Cowen, 349; Green v. Mayor, etc., 6 Ga. 1; Stuyvesant v. New York, 7 Cowen, 604.

[4] St. Louis v. Stern, 3 Mo. App. 48.

[5] Lawton v. Steele, 119 N. Y. 226, 16 Am. St. Rep. 318; Mugler v. Kansas, 123 U. S. 661; Wynehawer v. People, 13 N. Y. 378; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

[6] Wood on Nuisances, p. 773, § 740; Beach, Pub. Corp. §§ 1026, 1029, 1031; Wreford v. People, 14 Mich. 41; State v. Jersey City, 29 N. J. Law, 170; Everett v. Council Bluffs, 46 Iowa, 66; *In re* Jacobs, 98 N. Y. 98; Yates v. Milwaukee, 10 Wall. 497; Village of Des Plaines v. Poyer, 123 Ill. 348; Bliss v. Belknap, 36 Iowa, 583; Chicago v. Laflin, 49 Ill. 172; Patterson v. Vail, 43 Iowa, 412; Dillon on Municipal Corp. (3d Ed.), § 374, Tied. Lim. § 122; Evansville v. Miller (Sup. Ct. Ind.), 45 N. E. Rep. 1054.

[7] Van Wormer v. Mayor, etc., 15 Wend. 262; Kennedy v. Board of Health, 2 Pa. St. 366; Green v. Mayor, etc., 6 Ga. 1; State v. Heidenhain, 42 La. Ann. 459; Crosby v. Warren, 1 Rich. (S. C.) Law, 385; Kennedy v. Snowden, 1 McMullen (S. C.), 323; Goddard v. Jacksonville, 15 Ill. 588.

[8] Kansas City v. Neal, 49 Mo. App. 72; Kansas City v. McAleer, 31 Mo. App. 436; St. Louis v. Steele, 12 Mo. App. 570.

[9] St. Louis v. Stern, 3 Mo. App. 48, 55; People v. Rosenberg, 138 N. Y. 410.

[10] State v. Heidenhain, 42 La. Ann. 483.

lice regulation, and in a proceeding under such ordinance it is not necessary to show that the cultivation of rice is injurious to health, since the power to declare what constituted a nuisance was conferred by the charter.[11] The opinion in the last case is based upon the principle of Martin v. Mott,[12] which is that where a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of these facts. So, where the legislature confers upon an incorporated town the power to declare what shall be a nuisance, an ordinance declaring that swine running at large within the town is a nuisance is valid.[13] Likewise, an ordinance declaring that the selling of spirituous liquors within the corporate limits of a city is a nuisance.[14]

4. *True Doctrine Stated—Illustrations.*—The general rule of law is well established, and supported by authorities, that the power of a municipality to declare what shall be deemed a nuisance is not so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not.[15] Likewise, the general proposition is well supported that under a general grant of power over nuisances, municipal authorities have no power to pass an ordinance declaring a thing a nuisance which, in fact, is clearly not one.[16] There are some things which, in their nature, are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character, in this respect, depending on circumstances.[17]

Speaking for the Supreme Court of the United States, Mr. Justice Miller said: "It is a doctrine not to be tolerated in this country that a municipal corporation, without general laws, either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or can by the city itself. This would place every house, every business, and all property of the city at the uncontrolled will of the temporary local authorities."[18] In a recent case before the Supreme Court of Indiana, where it appeared that the city had the power to declare what shall constitute a nuisance conferred upon it by the State legislature, it was held that the city had no power to declare by ordinance that a partially burned building constituted a nuisance, irrespective of its actual condition as effecting private or public safety and health.[19] Likewise, it has been held in Illinois that public picnics and open air dances are not, in their nature, nuisances, and cannot be so declared by ordinance, notwithstanding the power to declare and abate nuisances exists in the city by virtue of the State law. The nuisance must consist in the manner of conducting them which may be productive of annoyance and injury to the public, and this is a question of fact and not of law.[20] The same rule has been declared in Colorado where the charter of the city of Denver conferred upon it the authority to declare what shall be a nuisance and to prevent and abate the same. Here it was held that this grant of power did not authorize the city to arbitrarily declare any particular thing a nuisance which had not theretofore been declared such by law, or so adjudged by judicial determination. The court said: "The proper construction of this language is that the city is clothed with the authority to declare, by general ordinance, what shall constitute a nuisance; that is to say, the city may by such ordinance, define, classify, and enact what things or classes of things, and under what conditions and circumstances such specified things are to constitute and be deemed nuisances."[21]

5. *Courts are Reluctant to Interfere—Reasonableness.*—Where a city possesses express authority to declare, prevent, and abate nuisances, the enactment of an ordinance of the character under consideration makes out a

[11] Green v. Mayor, etc., 6 Ga. 1.
[12] 12 Wheat. 19.
[13] Roberts v. Ogle, 30 Ill. 459; Crosby v. Warren, 1 Rich. (S. C.) Law, 385; Kennedy v. Snowden, 1 McMullen (S. C.), 323.
[14] Goddard v. Jackson, 15 Ill. 588.
[15] Yates v. Milwaukee, 10 Wall. 497; River Rendering Co. v. Behr, 77 Mo. 91, 98.
[16] Evansville v. Miller (Sup. Ct. Ind.), 45 N. E. Rep. 1054.
[17] Town of Lake View v. Letz, 44 Ill. 81.
[18] Yates v. Milwaukee, 10 Wall. 497.
[19] Evansville v. Miller (Sup. Ct. Ind.), 45 N. E. Rep. 1054.
[20] Village of Des Plains v. Poyer, 123 Ill. 348.
[21] City of Denver v. Mullens, 7 Colo. 345.

prima facie case that it is reasonable.[22] It is generally held that municipal corporations are *prima facie* the sole judges of the necessity of ordinances of this character, and courts will not ordinarily review their reasonableness when passed in pursuance of an express grant of power.[23] Hence, an ordinance declaring that the running of a rock crushing machine on a block or square, where there are three or more residences occupied, is a nuisance, is reasonable and constitutes such act a nuisance.[24] A clear case should be made out to authorize a court to interfere with the powers of a city respecting the exercise of its police powers on the ground of unreasonableness.[25] Where the question is in doubt the action of the municipal corporation is conclusive.[26] "In determining whether it is reasonable the court should not substitute its discretion for that of the municipal legislature."[27] Ordinarily, whether or not an ordinance is reasonable is a question for the court and not the jury.[28] The presumption is that an ordinance duly passed by virtue of the power conferred by the charter is reasonable, and the burden is upon the party who denies the validity of the ordinance.[29] "Before a by-law can be set aside on this ground, its unreasonableness must be shown demonstrably. There should be no equipoise or vacillation in the beam, the scale containing the proofs should instantly descend and hold the counter-proofs in steady suspension."[30] "The authorities of a city are invested with a large discretion in determining the necessity or expediency of the ordinances they shall adopt; and when the powers are exercised within the bounds of reason and apparent necessity, they should not be held null by the courts."[31] "In assuming of the right to judge of the reasonableness of the exercise of corporate powers, courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted a clear case should be made to authorize an interference on the ground of unreasonableness."[32] Where it is conceded that a municipal corporation has the power to pass an ordinance, "the mere passage of the ordinance makes out a *prima facie* case for the validity of the ordinance, so far as it concerns any question of reasonableness; the presumtion is in favor of the exercise of the power of the city authorities as being a reasonable and legitimate exercise of such power. When the courts are called upon to exercise the judicial powers in declaring a municipal ordinance unreasonable, they will make such a declaration only when the *prima facie* case made by the passage of the ordinance is overcome in the most satisfactory manner.[33]

6. *Doubt as to Nuisance.* — "In doubtful cases," says the Supreme Court of Illinois, "where a thing may or not be a nuisance, depending upon a variety of circumstances, requiring judgment or discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under such circumstances, will be conclusive of the question. There are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power, like the one in question, declare a nuisance —such, for instance, as the exercise of certain trades and callings, as that of a physician, druggist and the like. In all such cases as these, courts, acting upon their own experience and knowledge of human affairs, would say, as matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any

[22] Morse v. West Point, 110 Mo. 502; Fisher v. Harnesberg, 2 Grant (Pa.), 292; The Commonwealth v. Robertson, 5 Cush. 438.

[23] Hannibal v. Telegraph Co., 31 Mo. App. 23; St. Louis v. Green, 7 Mo. App. 468.

[24] Kansas City v. McAleer, 31 Mo. App. 433.

[25] St. Louis v. Weber, 44 Mo. 547; State v. Pond, 93 Mo. 606; Plattsburg v. Riley, 42 Mo. App. 18; St. Louis v. Speigel, 8 Mo. App. 478.

[26] Railroad v. Lake View, 105 Ill. 207; St. Louis v. Griswold, 58 Mo. 192; State v. Able, 65 Mo. 357.

[27] Kansas City v. McAleer, 31 Mo. App. 436.

[28] Commonwealth v. Worcester, 3 Pick. 462; State v. Overton, 4 Zab. (N. J.) 435; 1 Dillon Munic. Cor. sec. 327; Angel & Ames Cor. sec. 357; Boston v. Shaw, 1 Met. (Mass.) 130; Commonwealth v. Stodder, 2 Cush. (Mass.) 562.

[29] State v. Trenton, 53 N. J. L. 132, 20 Atl. Rep. 1076.

[30] Paxon v. Sweet, 13 N. J. L. 196.

[31] Morse v. West Point, 110 Mo. 502, 508; City of Tarkio v. Cook, 120 Mo. 1, 9; Maggard v. Pond, 77 Mo. 117; State v. Burgdoerfer, 107 Mo. 1, 34; State v. Kingsley, 108 Mo. 135, 139.

[32] Per Bliss, J., in St. Louis v. Weber, 44 Mo. 550.

[33] Morse v. West Point, 110 Mo. 502, 508, 509.

attempt to so declare them by the municipal authorities would be an unwarranted abuse of their power. On the other hand, there are many things which courts, without proof, will, on the same principle, declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstruction nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance." Accordingly, in this case, it was held that the use of steam as motive power in operating trains along and over one of the public streets of the town, contrary to an ordinance, was *per se* a public nuisance.[34]

St. Louis, Mo. EUGENE MCQUILLIN.

[34] North Chicago City Ry. Co. v. Lake View, 105 Ill. 212, 213.

BENEFICIAL ASSOCIATIONS — CHANGE OF BENEFICIARY.

FISCHER v. FISCHER.

Supreme Court of Tennessee, October 30, 1897.

One who has a mutual benefit policy may change the beneficiary, where authorized by the insurer's by laws, though the original beneficiary has paid assessments or incurred expenses.

WILKES, J.: This is a contest between a brother and sister over the proceeds of a benefit certificate in the order of Knights of Honor upon the life of their father. The father, William Fischer, had been a member of the order for quite a number of years, and carrying insurance in it upon his life. The original certificate was for $2,000, and was payable to his wife. She died in 1889, and the certificate, in May, 1895, was surrendered, and a second certificate was issued instead, for a like amount, but payable $800 to John A. Fischer, $800 to Harriet B. Fischer, and the remaining $400 to three other children. On the 23d of December, 1895, this second certificate was surrendered to the lodge, and in its stead a third certificate was issued for the same aggregate amount, payable $200 to John A. Fischer, $1,400 to Harriet B. Fischer, and the remaining $400 to the three children, as provided in the previous certificate. On the 8th of January 1896, the father died. On the 4th of February, 1896, the complainant, John A. Fischer, filed this bill against his sister Harriet and the Supreme Lodge Knights of Honor to compel the payment of the $2,000 into court, and its apportionment according to the second certificate, so as to give him $800 of the fund, as provided by that certificate. The chancellor granted the relief prayed, and directed that the daughter be refunded one-half the amounts she had paid out in nursing and caring for her father in his last illness, in his burial expenses, and for a lot in the cemetery, and divided the costs. The defendant by appeal, and the complainant by writ of error, brought the case to this court, and it has been heard by the court of chancery appeals. That court reversed the holding of the chancellor, and directed the fund to be paid out as provided by the last certificate, that the son be not required to repay to his sister anything on account of nursing expenses of last sickness after the removal to the hospital or burial of the father, and directed that defendant Harriet pay one-half the costs in the court below and the complainant the other half and all the costs of the appeal, and remanded the cause to the court below for the execution of the decree. The complainant, John A. Fischer, appealed to this court, and has assigned errors. The Supreme Lodge Knights of Honor has been permitted to pay the fund into court, and has no further interest in the controversy. The questions presented for the consideration of this court by the assignment of errors are: (1) Whether the parties to whom the second certificate was issued were thereby clothed with a vested right which the member could not afterwards change or defeat without the consent of the beneficiaries in the certificate. (2) Whether the complainant, John A. Fischer, if he had a vested right under the second certificate, forfeited his rights thereunder by abandoning or failing to comply with certain agreements made by him as to the maintenance of his father, which formed the consideration for the provisions in his favor in that certificate.

The facts, so far as necessary to be stated, are that the second certificate was issued upon an agreement, entered into between the father, son, and daughter, that the brother would furnish the father with a home and maintenance, and pay half his dues to the order, and the daughter would pay the other half of dues, and furnish him all necessary clothing, and they would each, in consideration therefor, have $800 of the proceeds of the insurance. The court of chancery appeals find that, in accordance with this mutual agreement, the father did live with the son for several months. He was then stricken with partial paralysis, and after about two months was removed to a hospital, where he became helpless, and required much care and constant attention. The son was a poor man, working for daily wages, and his wife was out at service for a great part of the time, so that proper care and attention could not be given at the son's house. That court finds

that the son was willing to do all he could, but recognized the fact that his circumstances were such as to prevent him from giving the constant attention and care required. By mutual consent, and on the advice of friends, he was taken to a hospital, where he could be better cared for. Up to this time the agreement had been carried out so far as practicable by the son and daughter, the latter contributing something more than the son towards the payment of assessments. The court of chancery appeals conclude that when the son agreed to the removal of his father to the hospital, to be kept and cared for, he abandoned his agreement to furnish him a home and maintenance, and thereby surrendered all contractual rights in the certificate, if he had any; and that the father had the right to change the beneficiaries, surrender the certificate, and take out a new one; and that the son had no vested right or interest in the proceeds of the second certificate that could defeat this right. The court of chancery appeals find that when the father took out the third or last certificate he was mentally capable of transacting such business, and did understand what he was doing, and the nature and effect of his act; that he made the change in certificates of his own volition, and his daughter was guilty of no fraud in relation thereto. The son did not know of the change in certificate until after it was accomplished, but before the death of the father; but there does not appear to have been any intentional concealment from him or bad faith towards him in the matter.

The first question presented is whether the son had any vested interest or right in the proceeds of the insurance upon the life of the father which would prevent the father from canceling the second and taking out the last certificate, thus changing the son's beneficial interest in the proceeds. Under the constitution and general laws of the Knights of Honor (article 9, § 4) it is provided that: "A member desiring to change his beneficiary may at any time, while in good standing, surrender to his lodge his benefit certificate, which shall be sent to the supreme reporter," etc. "And he shall thereupon cancel the old certificate, and issue a new one in lieu thereof to such member, payable as he shall have directed, within the limitations prescribed by the laws of the order; said surrender and direction to be made on the back of the benefit certificate surrendered, signed by the member, and attested by the reporter under the seal of the lodge." The provisions of this section were strictly followed in surrendering the second and issuing the third, or last, certificate. It is held in a number of cases, principally in New York and California, following the New York cases, that the beneficiary who pays assessments does acquire an interest which cannot be devested without his consent, when there is a special agreement to that effect, or that no substitution shall be made. See the cases cited in 3 Am. & Eng. Enc. Law (2d Ed.), 993, and note 4. But these cases are not in accord with the current weight of authority. *Id.* 990, and notes. The rule approved in the majority of cases is based upon the provisions and reservations contained in the charter and by-laws of the society, and this furnishes the distinction between ordinary life and mutual benefit insurance policies. *Id.* 991. This rule adopted in the majority of cases is in accord with the objects and purposes of beneficial orders in which the benevolent feature prevails largely. It is the policy of the law to discourage agreements by which a certificate in such order may be transferred to a third person, and be held and used by him as a speculation or business venture, and hence no restrictions will be thrown around the right of the member to change his certificate and beneficiaries if he so desire. Quinn v. Supreme Council (Tenn. Sup.), 41 S. W. Rep. 843; Sofge v. Supreme Lodge (Tenn. Sup.), 39 S. W. Rep. 853. The laws, articles of association, and certificates of membership of the order determine the rights of the members, and these laws, articles, and provisions of membership will be respected and enforced by the courts. Association v. Jones (Pa. Sup.), 26 Atl. Rep. 253; Chartrand v. Brace (Colo. Sup.), 26 Pac. Rep. 152; Association v. Stapp (Tex. Sup.), 14 S. W. Rep. 168; Otto v. Tailors' Union (Cal.), 17 Pac. Rep. 217; Sabin v. Phinney (N. Y. App.), 31 N. E. Rep. 1087; Niblack, Ben. Soc. & Acc. Ins. § 166; May, Ins. § 552; Bliss, Ins. § 426; Association v. Montgomery (Mich.), 38 N. W. Rep. 588; Martin v. Stubbings (Ill. Sup.), 18 N. E. Rep. 657. The vital point and determining facts as to the rights of the holder and beneficiary are to be found in the laws of the order, by virtue of which the certificate of a member is within his power, control, and disposition, so long as he lives; and no interest does or can vest in a beneficiary so as to defeat this right. Catholic Knights v. Kuhn, 91 Tenn. 241, 18 S. W. Rep. 385; Handwerker v. Diermeyer, 96 Tenn. 619, 36 S. W. Rep. 869; Sofge v. Supreme Lodge (Tenn. Sup.), 39 S. W. Rep. 853; Association v. Winn, 96 Tenn. 224, 33 S. W. Rep. 1045. The beneficiary during the life of the member can have no more than a mere expectancy, resting entirely upon the volition of the member; and this cannot, during the member's life, rise to the dignity of a vested property right. It is no more than the mere expectancy of a legatee or devisee, which, although it may be recognized by one will, may be defeated and extinguished by the execution of a subsequent will. The final power of disposition rests in the testator or member so long as he lives. The laws and regulations of the order enter into and become a part of every certificate issued to a member. Nor can it alter the rule that the expectant beneficiary has paid assessments or incurred expense upon the faith of the provisions in his behalf in a certificate which is afterwards canceled and changed. What the rights of such expectant beneficiary may be against the member personally, growing out of such payments made and expenses in-

curred, we need not consider as that question is not before us. But under the prevailing rule as laid down and recognized by the current of authority and by our own cases, the member's right to dispose of the insurance exists, notwithstanding the beneficiary originally named has paid assessments or incurred expense. Fisk v. Union (Pa. Sup.), 11 Atl. Rep. 84; Byrne v. Casey, 70 Tex. 247, 8 S. W. Rep. 38; Association v. Bunch, 109 Mo. 560, 19 S. W. Rep. 25; 3 Am. & Eng. Enc. Law (2d Ed.), 992, note 3; Quinn v. Supreme Council (Tenn. Sup.), 41 S. W. Rep. 843. But it is insisted that, if all this be conceded, there is still an equity existing between the brother and sister arising out of their agreement, which, while it cannot be enforced against the order, and contrary to the terms of the certificate, still should be recognized as between the brother and sister, and enforced against the proceeds, after they have been paid into court by the order. In other words, the order having paid the fund into court, to be distributed as the court may deem proper, and thus discharged its liability under the terms of the certificate, the court will distribute the fund between the son and daughter according to their agreement and the terms of the second certificate, and without regard to the terms of the last certificate, which was taken out without the son's consent or knowledge. It is not intended to hold that a case may not be presented that will call for such action, and where the equities of the parties *inter sese* may not be adjusted in the proceeds without regard to the terms of the certificate under which the money is paid into court. But under the findings of the court of chancery appeals such a case is not presented in this controversy. That court finds that the son was unable to carry out his agreement to maintain his father, and that he abandoned the attempt, not from a desire so to do, but from necessity. It finds also that the sister attempted to exercise no improper influence over the father, and that he made the change in his certificate of his own volition, and she was guilty of no fraud in relation to it, and that the father comprehended the nature and purport of his action in changing the certificate. This state of facts does not raise any equity upon the part of the brother to have the fund distributed upon any different basis or in any manner different from that provided in the final certificate. The decree of the court of chancery appeals is affirmed, and the cause remanded as directed by that court.

NOTE.—*Recent Decisions on Change of Beneficiaries in Mutual Benefit Insurance.*—The holder of a certificate in a mutual relief association applied for "change of beneficiary," stating that the former certificate was thereby returned, and surrendered for the purpose of the application, and that the association should forward a new certificate, payable to such persons as he might name in his will. The certificate was issued accordingly, but no beneficiaries were ever designated, by will or otherwise. Held, that no change of the beneficiaries took place. Grace v. Northwestern Mut. Relief Assn. (Wis.), 58 N. W. Rep. 1041. Where the beneficiary in a policy is changed on the application of the insured, who asks that the change be made, "provided" the original beneficiary "does not claim," such change is subject to the rights of the original beneficiary, and, unless he is dead, or his claim has been released or barred by limitation, the new beneficiary cannot recover on the policy. Helfrich v. John Hancock Mut. Life Ins. Co., 28 N. Y. S. 535, 8 Misc. Rep. 320. Where a person became a member of a mutual benefit association under an agreement with the person designated in the certificate as beneficiary that the beneficiary should pay all the assessments, and they were so paid, the beneficiary acquired a vested interest in the certificate, and the member could not afterwards make another designation. Maynard v. Vanderwerker (Sup.), 24 N. Y. S. 932, 30 Abb. N. C. 134. The rules of a benefit association provided that a change of beneficiary could be made only by indorsing the desire for change on the back of the certificate, and paying a recording fee. Deceased took out a policy in favor of his wife, and, after divorce from her, made a sworn statement to the company that he desired a change of beneficiary, and could not obtain possession of the certificate from his former wife. On the company's disapproval of the application, he disposed by will of the proceeds to become due on the policy. Held, that such disposition created a valid change of beneficiary. Grand Lodge of the Ancient Order of United Workmen v. Kohler (Mich.), 63 N. W. Rep. 897. The laws of a benefit association provided the manner in which a member could change the beneficiaries in his policy, subject to the provisions that care must be taken to see that the persons of a member's family legally dependent on him should receive the money. The association refused to approve a change giving to the member's married daughters a larger share than was given them in the original policy, his wife's share being diminished, and no new policy was issued. Held, that the association had no discretion in approving changes, and therefore the beneficiaries were entitled to share in the proceeds of the policy as if the change had been made. Scholl v. Sadoury (Pa. Com. Pl.), 25 Pittsb. Leg. J. (N. S.) 43. If sound equities exist in favor of the original beneficiary of an insurance certificate, the insured is estopped to substitute a second beneficiary, whose *status* is purely that of a volunteer. Jory v. Supreme Council, American Legion of Honor, 38 Pac. Rep. 524, 105 Cal. 20. Under Laws 1892, ch. 690, sec. 238, providing that a change of beneficiaries shall be made on the consent of the society in the manner prescribed by its by-laws, an indorsement on the certificate of membership directing payment to a person not named in the certificate is not a valid transfer of the insurance, without the consent of the society. Armstrong v. Warren, 31 N. Y. S. 665, 83 Hun, 217. Where the class of beneficiaries prescribed by the charter of a benevolent society is the "family, orphans, and dependents" of the members, and a member originally designated his wife as the beneficiary, an attempted substitution of a beneficiary not of that class is ineffectual to annul the designation of the wife. Di Messiah v. Gern, 30 N. Y. S. 824, 10 Misc. Rep. 30. Where the by-laws of a mutual benefit association provide that, to change the beneficiary in a policy, the policy shall be surrendered, the beneficiary named in the policy is entitled to the money, though the insured, who married after taking out the policy, intended to make his wife the beneficiary, and a few days before his death handed the policy to his brother, who promised to have the wife made the beneficiary, but failed to do so. McLaughlin v. Mc-

Laughlin, 37 Pac. Rep. 865, 104 Cal. 171. A mutual benefit association cannot, after a policy holder's death, waive the requirements of the by-laws as to the mode of changing the beneficiary in the policy. McLaughlin v. McLaughlin, 37 Pac. Rep. 865, 104 Cal. 171. The provision in the constitution of a mutual benefit association, that an application for change of beneficiary in a certificate shall be filed within 30 days of its date, may be waived by the association, and is waived by issue of a certificate naming the new beneficiary. Adams v. Grand Lodge of A. O. U. W. (Cal.), 38 Pac. Rep. 914, 105 Cal. 321. Where the by-laws of a benefit insurance society allowed the insured to change the beneficiary in the certificate, on surrendering it and complying with certain rules, and the insured complied with all the other rules, but did not surrender the certificate, because the first beneficiary had possession thereof, and refused to give it up, equity will, as between the rival beneficiaries, consider the rules complied with, and the substitution made. Jory v. Supreme Council, American Legion of Honor (Cal.), 38 Pac. Rep. 524, 105 Cal. 20. In the absence of contract, the payment of insurance assessments by the beneficiary is gratuitous, and creates no equities in his favor which are available against one afterwards substituted as beneficiary. Jory v. Supreme Council, American Legion of Honor (Cal.), 38 Pac. Rep. 524, 105 Cal. 20. The charter and articles of a mutual benefit association provided that the death benefit should be paid to the member's family, or be disposed of as the member might direct. Held that, if the member had surrendered his original certificate, which provided for the payment of the benefit to his family, and applied for a new one, payable to another beneficiary, but died before the application could, in the regular course of the business, be acted upon, the last named beneficiary would still be entitled to the benefit. Berkeley v. Harper, 3 App. D. C. 308. A certificate in a mutual benefit association provided for payments of benefits to certain named beneficiaries. Held that, where there had been no revocation of the certificate, the insured had no interest which he could dispose of by will. Silva v. Supreme Council of Portuguese Union of State of California, 42 Pac. Rep. 32, 109 Cal. 373. Children, as beneficiaries in a certificate of membership of their father in a benefit association, acquire no vested interest therein by law till death of their father. Hoeft v. Supreme Lodge Knights of Honor (Cal.), 45 Pac. Rep. 185. Act July 1, 1887, providing for the organization of beneficial associations, authorized the issue of certificates for the benefit of designated beneficiaries. The by-laws of an association provided that the benefit secured by the certificate might be paid to the person designated by will, or by the certificate. Held, that under the statute it was within the rights of a member to change the beneficiary by will; and, as to certificates issued prior thereto, this right was not affected by Act June 22, 1893, restricting the payment of benefit certificates to certain named persons, and providing that such benefits could not be willed or transferred to other persons. Kerstenv. Voigt, 61 Ill. App. 42. A benefit association "organized for the purpose of assisting widows, orphans, or other dependents of deceased members by providing for the payment of each member of a fixed sum to be held until the death of a member, then to be paid to the person or persons entitled thereto," etc., issued a policy which provided that it might be assigned "to any party having an insurable interest in the life of said member, with he assent thereto of the beneficiary herein," and with the assent of the proper officers of the association. Held, that a simple creditor of the member did not have an insurable interest in his life, within the meaning of the provision. National Exch. Bank v. Bright (Ky.), 36 S. W. Rep. 10. A benefit policy provided that "the beneficiary herein may at any time be changed, at the request in writing of the member above named, on the surrender of the policy, and a new one may be issued on payment to the association of one dollar." On the margin of the policy it was noted, "At the request of the holder of this policy, the beneficiary is hereby changed by the substitution of" a certain bank, a creditor, or its successor, "instead of the person therein named," and signed by the association's treasurer. Held, that the marginal notation was without any effect whatever. National Exch. Bank v. Bright (Ky.), 36 S. W. Rep. 10. The by-laws of a benefit insurance company provided that no change of beneficiaries should be made except on application by the member, when the old certificate should be canceled, and a new one issued. A member took out a certificate payable to his daughter, and delivered it to another for safe-keeping, and thereafter, without surrendering it, took out another certificate, payable to his wife, and kept the latter until his death. Held, that the facts that the member made no written application for a change of beneficiaries, and that it did not appear that he ever requested a change of beneficiaries, did not warrant a conclusion that no application was ever made, so as to preclude a recovery on the later certificate, as against the beneficiary named in the former. Becker v. Minnesota Odd Fellows' Mut. Ben. Soc. (Minn.), 64 N. W. Rep. 895. Where a certificate of insurance in a benefit association provides that a member may change his beneficiary at any time by complying with certain requirements of the by-laws, a substitution of beneficiaries in a manner not authorized by such by-laws is invalid. Head v. Supreme Council Catholic Knights, 2 Mo. App. Rep. 1110. The laws of a mutual benefit society and its certificate authorized the member to dispose of the certificate by will. A member, whose certificate was payable to his wife, signed a paper addressed "to the officers and members," which recited that, "it is my will that the benefit named in this certificate be paid to F, my wife." The paper was not attested nor probated as a will. Held, that such paper gave the wife no vested interest in the certificate. Handwerker v. Diermeyer (Tenn. Sup.), 36 S. W. Rep. 869. In the absence of a showing to the contrary, it will be presumed that a member of a benevolent society has power to change the certificate of membership. Thomas v. Grand Lodge of Ancient Order of United Workman of Washington, 41 Pac. Rep. 882, 12 Wash. 500. The interest of the beneficiary of a certificate in a benevolent association is not vested before the death of the member, but is a mere expectancy, which may be changed at any time by such member. Thomas v. Grand Lodge of Ancient Order of United Workmen of Washington, 41 Pac. Rep. 882, 12 Wash. 500.

LEGALITY OF THE BOYCOTT.

HOPKINS v. THE OXLEY STAVE CO.

United States Circuit Court, Eighth District.

Opinion Filed November 8th, 1897.

Injunction will be granted to restrain a labor association from boycotting the products of a manufactory which are made by machinery instead of hand labor.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

Thayer, C. J., delivered the opinion of the court: This case comes on appeal from an order, made by the Circuit Court of the United States for the District of Kansas, granting an interlocutory injunction. The motion for the injunction was heard on the bill and supporting affidavits, and on certain opposing affidavits. There is no substantial controversy with reference to the material facts disclosed by the bill and accompanying affidavits, which may be summarized as follows: The appellants, H. C. Hopkins and others, who were the defendants below, are members of two voluntary unincorporated associations termed respectively the Coopers' International Union of North America, Lodge No. 18, of Kansas City, Kansas, and the Trades Assembly of Kansas City, Kansas. The first of these associations is a labor organization composed of coopers, which has local lodges in all the important trade centers throughout the United States and Canada. The other association, the Trades Assembly of Kansas City, Kansas, is a body composed of representatives of many different labor organizations of Kansas City, Kansas, and is a branch of a general organization of the same name which exists and operates by means of local assemblies in all the principal commercial centers of the United States and Europe. The Oxley Stave Company, the plaintiff below and appellee here, is a Missouri corporation which is engaged at Kansas City, Kansas, where it has a large cooperage plant, in the manufacture of barrels and casks for packing meats, flour and other commodities. It sells many barrels and casks annually to several large packing associations located at Kansas City, Missouri, and Kansas City, Kansas, and also has customers for its products in sixteen other States of the Union and in Europe. Its annual output for the year 1895 was of the value of $164,178. For some time prior to November 16, 1895, the plaintiff company had used successfully in its cooperage plant at Kansas City, Kansas, certain machines for hooping barrels, which materially lessened the cost of making the same. It did not confine itself exclusively to the manufacture of machine-hooped barrels, but manufactured besides many hand-hooped barrels, and employed a large number of coopers for that purpose. The wages paid to the coopers in its employ were satisfactory, and no controversy had arisen between the plaintiff and its employees on that score. On or about November 16, 1895, the plaintiff company was informed by a committee of persons representing the local lodge of the Coopers' Union No. 18, at Kansas City, Kansas, that it must discontinue the use of hooping machines in its plant. Said committee further informed the plaintiff that they had already notified one of its largest customers, Swift & Company, that in making contracts with the plaintiff for barrels, the Coopers' Union would require such customer in future to specify that all barrels supplied to it by the plaintiff must be hand hooped. None of the members of this committee were employees of the plaintiff company, and, with one exception, none of the present appellants were, or are, in its employ. At a later date the Coopers' Union No. 18 called to its assistance the Trades Assembly of Kansas City, Kansas, for the purpose of enforcing its aforesaid demand, and on or about January 14, 1896, a committee of persons representing both of said organizations waited upon the manager of the plaintiff company, and notified him, in substance, that said organizations had each determined to boycott the product of the plaintiff company, unless it discontinued the use of hooping machines in its plant, and that the boycott would be made effective on January 15, 1896. The formal action taken by the Trades Assembly was evidenced by the following resolution:

"*To the Officers and Members of the Trades Assembly:*

"Greeting: Whereas the cooperage firms of J. R. Kelley and the Oxley Cooperage Company have placed in their plants hooping machines operated by child labor, and whereas said hooping machines is the direct cause of at least one hundred coopers being out of employment, of which a great many are unable to do anything else on account of age, and at a meeting held by Coopers' Union No. 18 on the 31st of December, 1895, a committee was appointed to notify the above firms that unless they discontinued the use of said machines on and after the 15th of January, 1896, that Coopers' Union No. 18 would cause a boycott to be placed on all packages hooped by said machines the 15th of January, 1896; and at a meeting held by Coopers' Union No. 18 on the 4th of January, 1896, delegates were authorized to bring the matter before the Trades Assembly in proper form and petition the Assembly to indorse our action and to place the matter in the hands of their Grievance Committee to act in conjunction with the committee appointed by Coopers' Union No. 18, to notify the packers before letting their contracts for their cooperage;

Therefore be it resolved: That this Trade Assembly indorse the action of Coopers' Union No. 18, and the matter be left in the hands of the Grievance Committee for immediate action.

Yours respectfully,

J. L. COLLINS, Sec'y.

Coopers' International Union of North America, Lodge 18."

It was also charged, and the charge was not denied, that the members of the voluntary organizations to which the defendants belonged had conspired and agreed to force the plaintiff, against its will, to abandon the use of hooping machines in its plant, and that this object was to be accomplished by dissuading the plaintiff's customers from buying machine-hooped barrels and casks, such customers to be so dissuaded through fear, inspired by concerted action of the two organizations, that the members of all the labor organizations throughout the country would be induced not to purchase any commodity which might be packed in such machine-hooped barrels or casks. The bill charged by proper averments, and no attempt was made to prove the contrary, that the defendants were persons of small means, and that the plaintiff would suffer a great and irreparable loss, exceeding $100,000, if the defendants were allowed to carry the threatened boycott into effect in the manner and form proposed.

The injunction which the court awarded against the defendants was, in substance, one which prohibited them, until the final hearing of the case, from making effective the threatened boycott, and from in any way menacing, hindering or obstructing the plaintiff company, by interfering with its business or customers, from the full enjoyment of such patronage and business as it might enjoy or possess, independent of such interference.

The first proposition contended for by the appellants is that the trial court acted without jurisdiction in awarding an injunction. The ground for this contention consists in the fact that in the bill as originally filed two persons were named as defendants who were citizens and residents of the State of Missouri, under whose laws the Oxley Stave Company was incorpo-

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On the margin of the policy it was noted, "At the request of the holder of this policy, the beneficiary is hereby changed by the substitution of" a certain bank, a creditor, or its successor, "instead of the person therein named," and signed by the association's treasurer. Held, that the marginal notation was without any effect whatever. National Exch. Bank v. Bright (Ky.), 36 S. W. Rep. 10. The by-laws of a benefit insurance company provided that no change of beneficiaries should be made except on application by the member, when the old certificate should be canceled, and a new one issued. A member took out a certificate payable to his daughter, and delivered it to another for safe-keeping, and thereafter, without surrendering it, took out another certificate, payable to his wife, and kept the latter until his death. Held, that the facts that the member made no written application for a change of beneficiaries, and that it did not appear that he ever requested a change of beneficiaries, did not warrant a conclusion that no application was ever made, so as to preclude a recovery on the later certificate, as against the beneficiary named in the former. Becker v. Minnesota Odd Fellows' Mut. Ben. Soc. (Minn.), 64 N. W. Rep. 895. Where a certificate of insurance in a benefit association provides that a member may change his beneficiary at any time by complying with certain requirements of the by-laws, a substitution of beneficiaries in a manner not authorized by such by-laws is invalid. Head v. Supreme Council Catholic Knights, 2 Mo. App. Rep. 1110. The laws of a mutual benefit society and its certificate authorized the member to dispose of the certificate by will. A member, whose certificate was payable to his wife, signed a paper addressed "to the officers and members," which recited that, "it is my will that the benefit named in this certificate be paid to F, my wife." The paper was not attested nor probated as a will. Held, that such paper gave the wife no vested interest in the certificate. Handwerker v. Diermeyer (Tenn. Sup.), 36 S. W. Rep. 869. In the absence of a showing to the contrary, it will be presumed that a member of a benevolent society has power to change the certificate of membership. Thomas v. Grand Lodge of Ancient Order of United Workman of Washington, 41 Pac. Rep. 882, 12 Wash. 500. The interest of the beneficiary of a certificate in a benevolent association is not vested before the death of the member, but is a mere expectancy, which may be changed at any time by such member. Thomas v. Grand Lodge of Ancient Order of United Workmen of Washington, 41 Pac. Rep. 882, 12 Wash. 500.

LEGALITY OF THE BOYCOTT.

HOPKINS v. THE OXLEY STAVE CO.

United States Circuit Court, Eighth District.

Opinion Filed November 8th, 1897.

Injunction will be granted to restrain a labor association from boycotting the products of a manufactory which are made by machinery instead of hand labor.

Before Caldwell, Sanborn and Thayer, Circuit Judges.

Thayer, C. J., delivered the opinion of the court: This case comes on appeal from an order, made by the Circuit Court of the United States for the District of Kansas, granting an interlocutory injunction. The motion for the injunction was heard on the bill and supporting affidavits, and on certain opposing affidavits. There is no substantial controversy with reference to the material facts disclosed by the bill and accompanying affidavits, which may be summarized as follows: The appellants, H. C. Hopkins and others, who were the defendants below, are members of two voluntary unincorporated associations termed respectively the Coopers' International Union of North America, Lodge No. 18, of Kansas City, Kansas, and the Trades Assembly of Kansas City, Kansas. The first of these associations is a labor organization composed of coopers, which has local lodges in all the important trade centers throughout the United States and Canada. The other association, the Trades Assembly of Kansas City, Kansas, is a body composed of representatives of many different labor organizations of Kansas City, Kansas, and is a branch of a general organization of the same name which exists and operates by means of local assemblies in all the principal commercial centers of the United States and Europe. The Oxley Stave Company, the plaintiff below and appellee here, is a Missouri corporation which is engaged at Kansas City, Kansas, where it has a large cooperage plant, in the manufacture of barrels and casks for packing meats, flour and other commodities. It sells many barrels and casks annually to several large packing associations located at Kansas City, Missouri, and Kansas City, Kansas, and also has customers for its products in sixteen other States of the Union and in Europe. Its annual output for the year 1895 was of the value of $164,173. For some time prior to November 16, 1895, the plaintiff company had used successfully in its cooperage plant at Kansas City, Kansas, certain machines for hooping barrels, which materially lessened the cost of making the same. It did not confine itself exclusively to the manufacture of machine-hooped barrels, but manufactured besides many hand-hooped barrels, and employed a large number of coopers for that purpose. The wages paid to the coopers in its employ were satisfactory, and no controversy had arisen between the plaintiff and its employees on that score. On or about November 16, 1895, the plaintiff company was informed by a committee of persons representing the local lodge of the Coopers' Union No. 18, at Kansas City, Kansas, that it must discontinue the use of hooping machines in its plant. Said committee further informed the plaintiff that they had already notified one of its largest customers, Swift & Company, that in making contracts with the plaintiff for barrels, the Coopers' Union would require such customer in future to specify that all barrels supplied to it by the plaintiff must be hand hooped. None of the members of this committee were employees of the plaintiff company, and, with one exception, none of the present appellants were, or are, in its employ. At a later date the Coopers' Union No. 18 called to its assistance the Trades Assembly of Kansas City, Kansas, for the purpose of enforcing its aforesaid demand, and on or about January 14, 1896, a committee of persons representing both of said organizations waited upon the manager of the plaintiff company, and notified him, in substance, that said organizations had each determined to boycott the product of the plaintiff company, unless it discontinued the use of hooping machines in its plant, and that the boycott would be made effective on January 15, 1896. The formal action taken by the Trades Assembly was evidenced by the following resolution:

"*To the Officers and Members of the Trades Assembly:*

"Greeting: Whereas the cooperage firms of J. R. Kelley and the Oxley Cooperage Company have placed in their plants hooping machines operated by child labor, and whereas said hooping machines is the direct cause of at least one hundred coopers being out of employment, of which a great many are unable to do anything else on account of age, and at a meeting held by Coopers' Union No. 18 on the 31st of December, 1895, a committee was appointed to notify the above firms that unless they discontinued the use of said machines on and after the 15th of January, 1896, that Coopers' Union No. 18 would cause a boycott to be placed on all packages hooped by said machines the 15th of January, 1896; and at a meeting held by Coopers' Union No. 18 on the 4th of January, 1896, delegates were authorized to bring the matter before the Trades Assembly in proper form and petition the Assembly to indorse our action and to place the matter in the hands of their Grievance Committee to act in conjunction with the committee appointed by Coopers' Union No. 18, to notify the packers before letting their contracts for their cooperage;

Therefore be it resolved: That this Trade Assembly indorse the action of Coopers' Union No. 18, and the matter be left in the hands of the Grievance Committee for immediate action.

Yours respectfully,

J. L. COLLINS, Sec'y.

Coopers' International Union of North America, Lodge 18."

It was also charged, and the charge was not denied, that the members of the voluntary organizations to which the defendants belonged had conspired and agreed to force the plaintiff, against its will, to abandon the use of hooping machines in its plant, and that this object was to be accomplished by dissuading the plaintiff's customers from buying machine-hooped barrels and casks, such customers to be so dissuaded through fear, inspired by concerted action of the two organizations, that the members of all the labor organizations throughout the country would be induced not to purchase any commodity which might be packed in such machine-hooped barrels or casks. The bill charged by proper averments, and no attempt was made to prove the contrary, that the defendants were persons of small means, and that the plaintiff would suffer a great and irreparable loss, exceeding $100,000, if the defendants were allowed to carry the threatened boycott into effect in the manner and form proposed.

The injunction which the court awarded against the defendants was, in substance, one which prohibited them, until the final hearing of the case, from making effective the threatened boycott, and from in any way menacing, hindering or obstructing the plaintiff company, by interfering with its business or customers, from the full enjoyment of such patronage and business as it might enjoy or possess, independent of such interference.

The first proposition contended for by the appellants is that the trial court acted without jurisdiction in awarding an injunction. The ground for this contention consists in the fact that in the bill as originally filed two persons were named as defendants who were citizens and residents of the State of Missouri, under whose laws the Oxley Stave Company was incorpo-

rated. But as the case was dismissed as to these defendants, and as to the two voluntary unincorporated associations, and as to all the members thereof who were not specifically named as defendants in the bill of complaint, before an injunction was awarded, and as the bill was retained only as against persons concerned in the alleged conspiracy who were citizens and residents of the State of Kansas, the objection to the jurisdiction of the trial court is, in our opinion, without merit. Oxley Stave Company v. Coopers' International Union of North America, 72 Fed. Rep. 695. It is further urged that the trial court had no right to proceed with the hearing of the case in the absence of any of the persons who were members of the two voluntary organizations, to-wit, The Coopers' Union No. 18 and the Trades Assembly of Kansas City, Kansas, because all the members of those organizations were parties to the alleged conspiracy. This contention seems to be based on the assumption that every member of the two organizations had the right to call upon every other member for aid and assistance in carrying out the alleged conspiracy, and that an injunction restraining a part of the members from rendering such aid and assistance would necessarily operate to the prejudice of those members who had not been made parties to the suit. In other words, the argument is that certain indispensable parties to the suit have not been made parties, and that full relief consistent with equity cannot be administered without their presence upon the record. We do not dispute the existence of the rule which the defendants invoke, but it is apparent, we think, that it has no application to the case in hand. The present suit proceeds upon the theory, without which no relief can be afforded, that the agreement entered into between the members of the two voluntary associations aforesaid, is an unlawful conspiracy to oppress and injure the plaintiff company; that no right whatsoever can be predicated upon, or have its origin in such an agreement, and that the members of the two organizations are jointly and severally liable for whatever injury would be done to the plaintiff company by carrying out the object of the alleged agreement. The rule is as well settled in equity as it is at law, that where the right of action arises *ex delicto*, the tort may be treated as joint or several, at the election of the injured party, and that he may, at his option, sue either one or more of the joint wrongdoers. Cunningham v. Pell, 5 Paige, 607; Wall v. Thomas, 41 Fed. Rep. 620, and cases there cited. We perceive no reason, therefore, why the case was not properly proceeded with against the appellants, although numerous other persons were concerned in the alleged combination or conspiracy.

We turn, therefore, to the merits of the controversy. The substantial question is whether the agreement entered into by the members of the two unincorporated associations to boycott the contents of all barrels, casks and packages made by the Oxley Stave Company which were hooped by machinery, was an agreement against which a court of equity can afford relief, preventive or otherwise? The contention of the appellants is that it was a lawful agreement, such as they had the right to make and carry out for the purpose of maintaining the rate of wages then paid to journeymen coopers, and that being lawful, the injury occasioned by the plaintiff company, no matter how great, was an injury against which neither a court of law nor equity can afford any redress. According to our view of the case, the claim made by the defendants below that one object of the threatened boycott was to prevent the employment of child labor, is in no way material, but in passing it will not be out of place to say that this claim seems to have been a mere pretense, since it was shown that the machinery used to hoop barrels cannot be managed by children, but must of necessity be operated by persons who have the requisite strength to handle barrels and casks weighing from seventy-five to eighty pounds with great rapidity. It is manifest that this is a species of labor which could not, in any event, be performed by children. Neither do we deem it necessary, on the present occasion, to define the term "boycott," for whatever may be the meaning of that word, no controversy exists in the present case concerning the means that were to be employed by the members of the two labor organizations for the purpose of compelling the plaintiff company to abandon the use of hooping machines. It is conceded that their purpose was to warn all of the plaintiff's immediate customers not to purchase machine-hooped barrels or casks, and to warn wholesale and retail dealers everywhere not to handle provisions or other commodities which were packed in such barrels or casks. This warning was to be made effectual by notifying the members of all associated labor organizations throughout the United States, Canada and Europe not to purchase provisions or other commodities, and, as far as possible, to dissuade others from purchasing provisions or other commodities, which were packed in machine-hooped barrels or casks. The object of the conspiracy, it will be seen, was to interfere with the complainant's business and to deprive the complainant company, and numerous other persons, of the right to conduct their business as they thought proper. To this end those who were engaged in the conspiracy intended to excite the fears of all persons who were engaged in making barrels, or who handled commodities packed in barrels, that if they did not obey the orders of the associated labor organizations, they would incur the active hostility of all the members of those associations, suffer a great financial loss, and possibly run the risk of sustaining some personal injury. It may be conceded that when the defendants entered into the combination in question, they had no present intention of resorting to actual violence for the purpose of enforcing their demands, but it is manifest that by concerted action, force of numbers, and by exciting the fears of the timid, they did intend to compel many persons to surrender their freedom of action, and submit to the dictation of others in the management of their private business affairs. Another object of the conspiracy, which was no less harmful, was to deprive the public at large of the advantages to be derived from the use of an invention which was not only designed to diminish the cost of making certain necessary articles, but to lessen the labor of human hands.

While the courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract (Arthur v. Oakes, 63 Fed. Rep. 310), yet they have very generally condemned those combinations usually termed boycotts, which are formed for the purpose of interfering otherwise than by lawful competition with the business affairs of others and depriving them by means of threats and intimidation of the right to conduct the business in which they happen to be engaged according to the dictates of their own judgments. The right of an individual to carry on his business as he sees fit,

and to use such implements or processes of manufacture as he desires to use, provided he follows a lawful avocation and conducts it in a lawful manner, is entitled to as much consideration as his other personal rights, and the law should afford protection against the efforts of powerful combinations to rob him of that right and coerce his will by intimidating his customers and destroying his patronage. A conspiracy to compel a manufacturer to abandon the use of a valuable invention bears no resemblance to a combination among laborers to withdraw from a given employment as a means of obtaining better pay. Persons engaged in any service have the power, with which a court of equity will not interfere by injunction, to abandon that service either singly or in a body if the wages paid, or the conditions of employment are not satisfactory, but they have no right to dictate to an employer what kind of implements he shall use or whom he shall employ.

Many courts of the highest character and ability have held that a combination such as the one in question is admitted to have been is an unlawful conspiracy at common law, and that an action will lie to recover the damages which one has sustained as the direct result of such a conspiracy; also that a suit in equity may be maintained to prevent the persons concerned in such a combination from carrying the same into effect, when the damages would be irreparable, or when such a proceeding is necessary to prevent a multiplicity of suits. The test of the right to sue in equity is whether the combination complained of is so far unlawful that an action at law will lie to recover the damages inflicted, and whether the remedy at law is adequate to redress the wrong. If the remedy at law is for any reason inadequate, resort may be had, as in other cases, to a court of equity.

In the case of Springhead Spinning Company v. Riley, 6 Equity Cases, 551, 558, Vice-Chancellor Malins held that an injunction was a proper remedy to prevent the officers of a trades union from using placards and advertisements to dissuade laborers from hiring themselves to the Spinning Company, pending a dispute between the latter company and the trades union as to wages. The court said: "That every man is at liberty to induce others, in the words of the act of Parliament, 'by persuasion or otherwise,' to enter into a combination to keep up the price of wages or the like; but directly he enters into a combination which has as its object intimidation or violence, or interfering with the perfect freedom of action of another man, it then becomes an offense, not only at common law, but also an offense punishable by the express enactment of the act, 6 Geo. 4, ch. 129. It is clear, therefore, that the printing and publishing of these placards and advertisements by the defendants, admittedly for the purpose of intimidating workmen from entering into the service of the plaintiffs, are unlawful acts, punishable by imprisonment under the 6 Geo. 4, ch. 129, and a crime at common law." In Temperton v. Russell, 1 Queen's Bench L. R. 715, the facts appear to have been that a committee representing certain trades unions, for the purpose of enforcing obedience to certain rules that had been adopted by the unions, notified the plaintiff not to supply building materials to a certain firm. He having declined to comply with such request, the committee thereupon induced certain third parties not to enter into further contracts with the plaintiff, such third parties being so induced by threats or representations that the unions would cause their laborers to be withdrawn from their employ in case such further contracts were made. It was held that the plaintiff had a right of action against the members of the committee for maliciously conspiring to injure him by preventing persons from having dealings with him. In delivering the judgment of the court the master of the rolls, Lord Esher, quoted with approval a statement of the law which is found in Bowen v. Hall, 6 Queen's Bench Division, 333, to the effect that where it appears that a defendant has, by persuasion, induced a third party to break his contract with the plaintiff, either for the purpose of injuring the plaintiff, or for the purpose of reaping a personal advantage at the expense of the plaintiff, the act is wrongful and malicious, and therefore actionable. In the case of State v. Stewart, 59 Vt. 273, it was held that a combination entered into for the purpose of preventing or deterring a corporation from taking into its service certain persons whom it desired to employ, was an unlawful combination or conspiracy at common law. The court said: "The principle upon which the cases, English and American, proceed is, that every man has the right to employ his talents, industry and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy. The labor and skill of the workmen, be it of high or low degree, the plant of the manufacturer, the equipment of the farmer, the investments of commerce, are all in equal sense property. If men by overt acts of violence destroy either, they are guilty of crime. The anathemas of a secret organization of men appointed for the purpose of controlling the industry of others by a species of intimidation that work upon the mind rather than the body, are quite as dangerous, and generally altogether more effective than acts of actual violence. And while such conspiracies may give to the individual directly affected by them a private right of action for damages, they at the same time lay the basis for an indictment on the ground that the State itself is directly concerned in the promotion of all legitimate industries and the development of all its resources, and owes the duty of protection to its citizens engaged in the exercise of their callings." In Barr v. Essex Trades Council, 30 Atlantic Reporter (N. J.), 881, it appeared that a publisher of a newspaper had determined to use plate matter in making up his paper, whereupon the members of a local typographical union, conceiving their interests to be prejudiced by such action, entered into a combination to compel him to desist from the use of such plate matter. The object of the combination was to be accomplished by the typographical union by a formal call upon all labor organizations with which it was affiliated, and upon all other persons who were in sympathy with it, to boycott the paper by refusing to buy it or advertise in the same. It was held, in substance, that a person's business is property, which is entitled under the law to protection from unlawful interference, and that the combination in question was illegal, because it contemplated a wrongful interference with the plaintiff's freedom of action in the management of his own affairs. Decisions embodying substantially the same views have been made by many other courts. Hilton v. Eckersley, 6 E. & B. 47, 74; Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48; Casey v. Cincinnati Typographical Union No. 3, 45 Fed. Rep. 135; Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. Rep. 803, 818; Arthur v. Oakes, 63 Fed. Rep. 310, 321, 322. See also Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; State v. Glidden, 55 Conn. 46; Vegelahn v. Gunter, 44 N. E. Rep. (Mass.) 1077. The cases which seem to be chiefly relied upon as sup-

porting the contention that the combination complained of in the case at bar was lawful, and that the action proposed to be taken in pursuance thereof ought not to be enjoined, are the following: Mogul Steamship Co., Limited, v. McGregor, Gow & Co., 23 Queen's Bench Div. 598; *Id.*, 1 Appeal Cases, 25; Continental Insurance Co. v. Board of Fire Underwriters of the Pacific, 67 Fed. Rep. 310, and Bohn Manufacturing Co. v. Hollis, 54 Minn. 223. In the first of these cases the facts were that the owners of certain steamships, for the purpose of securing all the freight which was shipped at certain ports, and doing a profitable business had formed an association and issued a circular to shippers at said ports agreeing to allow them a certain rebate on freight bills, provided they gave their patronage exclusively to ships belonging to members of the association. The association also prohibited its soliciting agents from acting as agents for other competing lines. A suit having been brought against the members of the association by a competing ship owner to recover damages which had been sustained in consequence of the formation and action of the association, it was held that the acts complained of were lawful, the same having been done simply for the purpose of enabling the members of the association to hold and extend their trade; in other words, that the acts complained of amounted to no more than lawful competition in trade. Continental Insurance Company v. Board of Fire Underwriters of the Pacific, was a case of the same character as the one last considered, and involved an application of the same doctrine. It was held, in substance, that an association of fire underwriters which had been formed under an agreement that provided, among other things, for the regulation of premium rates, the prevention of rebates, compensation of agents and non-intercourse with companies that were not members of the association, was not an illegal conspiracy, and that the accomplishment of its purpose by lawful means would not be enjoined at the suit of a competing insurance company which was not a member of the association. In the case of Bohn Manufacturing Company v. Hollis, it appeared that a large number of retail lumber dealers had formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a wholesale lumber business, and had provided in their by-laws that whenever any wholesale dealer or manufacturer made any such sale, the secretary of the association should notify all members of the fact. The plaintiff having made such a sale, and the secretary being on the point of sending a notice of the fact to members of the association, as provided by the by-laws, it was held that the sending of such a notice was not actionable, and that an injunction to restrain the sending of such notice ought not to issue. The decision to this effect was based on the ground that the members of the association might lawfully agree with each other to withdraw their patronage, collectively, for the reasons specified in the agreement, because the members individually had the right to determine from whom they would make purchases, and to withdraw their patronage at any time and for any reason which they deemed adequate. It is not always the case, however, that what one person may do without rendering himself liable to an action, many persons may enter into a combination to do. There is a power in numbers, when acting in concert to inflict injury, which does not reside in a single individual, and for that reason the law will sometimes take cognizance of acts done by a combination when it will not do so if committed by a single individual. Mogul Steamship Company, Limited, v. McGregor, Gow & Co., 1 Appeal Cases, 25, 45; *Id.*, 23 Queen's Bench Div. 598, 616; Arthur v. Oakes, 63 Fed. Rep. 310, 321; State v. Glidden, 55 Conn. 46. But conceding that the reasoning employed was sound, as applied to the facts of that case, it by no means follows, and that fact was recognized in the decision, that the members of the association would have had the right to combine for the purpose of compelling other persons, not members of the association, to withhold their patronage from a wholesale dealer who failed to conduct his business in the mode prescribed by the association.

We think it is entirely clear, upon the authorities, that the conduct of which the defendants below were accused cannot be justified on the ground that the acts contemplated were legitimate and lawful means to prevent a possible future decline in wages, and to secure employment for a greater number of coopers. No decrease in the rate of wages had been threatened by the Oxley Stave Company, and with one exception the members of the combination were not in the employ of the plaintiff company. The members of the combination undertook to prescribe the manner in which the plaintiff company should manufacture barrels and casks, and to enforce obedience to its orders by a species of intimidation which is no less harmful than actual violence, and which usually ends in violence. The combination amounted, therefore, to a conspiracy to wrongfully deprive the plaintiff of its right to manage its business according to the dictates of its own judgment. Aside from the foregoing considerations, the fact cannot be overlooked that another object of the conspiracy was to deprive the public at large of the benefits to be derived from a labor-saving machine which seems to have been one of great utility. If a combination to that end is pronounced lawful, it follows, of course, that combinations may be organized for the purpose of preventing the use of harvesters, threshers, steam looms and printing presses, type-setting machines, sewing machines, and a thousand other inventions which have added immeasurably to the productive power of human labor, and the comfort and welfare of mankind. It results from these views that the injunction was properly awarded, and the order appealed from is accordingly affirmed.

HUMORS OF THE LAW.

Lawyer (to timid young woman)—"Have you ever appeared as witness in a suit before?"

Young Woman (blushingly)—"Y-yes, sir; of course."

Lawyer—"Please state to the jury just what suit it was."

Young Woman (with more confidence)—"It was nun's veiling, shirred down the front, and trimmed with a lovely blue, with hat to match."

Judge (rapping violently)—"Order in the court."

Texas Technicalities.—Bronco Pete—"Yep, dat new lawyer got Ike off pretty slick for manslaughter."

Texas Tom—"How'd'e do it?"

Bronco Pete—"Wy, jes' 'fore de case went to de jury, he discovered dat several pages of de county Bible was torn out. Uv course dat made de book in-

walid; uv course dat made de swearing inwalid; en of course dat made de testimony uv seventy-eight witnesses inwalid; fer, uv course; de jury couldn't convict Ike on no sech song-en-dance testimony ez dat.'

When Judge Pendleton grows reminiscent he is always interesting. Court was short this morning, and when Mr. Henry Tompkins walked in he said: "Mr. Tompkins, your cousin, Louis Garth, was the only bully I ever saw who was a brave man. He was the most overbearing man I ever saw. He was in a poker game in camp with Lieutenant Forrest, and he called Forrest a liar. Forrest pulled his pistol, a double-barreled weapon, and placing it to Garth's breast, he pulled the trigger. The cartridge failed to fire, and Garth spat out a chew of tobacco, and, without moving a muscle, said: 'Lieutenant, you had better try the other barrel' Forrest put his weapon up, and said: 'Garth, you are a brave man, and I will not shoot a brave man.' They were inseparable friends forever afterward."—*Owensboro (Ky.) Enquirer.*

Chauncey M. Depew was among the first speakers at the first annual banquet of the Westchester (N. Y.) Bar Association the other night, and told the following story:

"I was attorney for the Harlem Railroad a long time ago. We had run down a farmer, paralyzed him and killed his team. I expected the verdict would be $10,000. It was $700. I was paralyzed. The next day the foreman of the jury of Westchester farmers came into my office. I recognized him at once as an active politician of the third Westchester district, whom Robertson and Jim Husted and I had always used on critical occasions. 'Chauncey,' said he, 'those galoots wanted a verdict of $4,000. I stuck out till we got $700. What do you think of a pass for five years?' Then I knew that a trial by jury was the palladium of our liberties."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ADMINISTRATION — Claim against Decedent's Estate.—On trial of a claim against an estate for services rendered deceased, claimant need not show that the services were worth more than the board and clothing furnished by deceased, in the absence of any plea of set-off or counterclaim, which are not available unless pleaded.—BOYD v. STARBUCK, Ind., 47 N. E. Rep. 1079.

2. APPEAL—Adverse Parties.—A trustee who has mortgaged the property of his beneficiary, and has defaulted in a suit for foreclosure brought against them jointly, is not a necessary adverse party on appeal by the beneficiary from a decree of foreclosure based on the estoppel of the beneficiary to deny the trustee's right to execute the mortgage.—ALLIANCE TRUST CO. v. O'BRIEN, Oreg., 50 Pac. Rep. 801.

3. APPEAL—Dedication — Intention.—The finding by the court of chancery appeals of an intention to dedicate a highway is one of fact, which cannot be reviewed.—ELLIS v. BRABSON, Tenn., 42 S. W. Rep. 488.

4. APPEAL—Law of the Case.—A decision by a court of last resort on appeal of a question presented by the record is thereafter the law of the case, whether the question arises each time in the same manner or not.—BRUNSON v. HENRY, Ind., 47 N. E. Rep. 1063.

5. ASSAULT AND BATTERY — Self-defense.—W demanded payment of a debt of defendant five or six times, though defendant informed him that he did not have the money. W had said that he was going to collect the money or have trouble, and defendant, being informed of it, went away, but, being followed by W he returned. W persisted in his demands, and defendant again turned to go away, when W grabbed him with both hands, and jerked him back, and thereupon defendant struck W: Held, not an assault and battery.—MANAHAN v. STATE, Ind., 47 N. E. Rep. 1076.

6. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Married Women.—A deed of assignment executed by a married woman for the benefit of creditors, which reserves any and all property that may be by law exempt from sale under execution to the assignor, does not pass the title to property that would have been exempt from sale under execution if the assignor had been a *feme sole*, even if a married woman be not entitled under the statute to the exemptions, such being the manifest intention of the parties.—WILSON'S ASSIGNEE v. WILSON, Ky., 42 S. W. Rep. 404.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS — Rights of Assignee.—A judgment, in an action by a creditor against his debtor, that an assignment by the latter is void, in no way affects the rights of the assignee, who is not a party to such action.—AVERA v. RICE, Ark., 42 S. W. Rep. 409.

8. ASSIGNMENTS FOR CREDITORS—Possession.—Mansf Dig. Ark. § 805, requires an assignee for the benefit of creditors in all cases to file an inventory and execute a bond, to entitle him to possession. A deed of assignment recited that the grantors "have sold, conveyed, and delivered" the stock of goods to the assignee: Held, that the deed was not void on its face as passing possession the moment it was executed, and before the filing of an inventory and bond; the word "delivered" being used to mean a transfer of title.—MARTIN-BROWN CO. v. MORRIS, I. T., 42 S. W. Rep. 428.

9. ASSIGNMENTS FOR CREDITORS — Reservation of Exemptions.—Where exemptions are reserved in genera

terms in an assignment for the benefit of creditors, the debtor may select the property within a reasonable time, and at a value not exceeding its market value at the time if it does not delay.—LAZARUS v. CAMDEN NAT. BANK, Ark., 42 S. W. Rep. 412.

10. ATTACHMENT — Grounds — Fraud.—Section 5289, Gen. St. 1894, does not authorize the issuing of an attachment, on the sole ground "that the plaintiff's debt was fraudulently contracted," in an action where the plaintiff's alleged cause of action is based upon a tort committed by the defendants, as directors of a bank, in receiving a deposit therein from the plaintiff, knowing the bank to be insolvent.—BAXTER v. NASH, Minn., 72 N. W. Rep. 799.

11. ATTORNEY AND CLIENT—Purchase of Client's Property.—The attorney holding relations, besides, toward his client, fairly implying he will charge himself with her business interests, cannot acquire the client's property, to her prejudice; the purchase of the property by the attorney being the result of the advice he gives the client. Such purchase will inure to the client, subject to the obligation to reimburse the attorney his expenses incident to the purchase and management of the property.—BRIGHAM v. NEWTON, La., 22 South. Rep. 777.

12. BILLS AND NOTES—Indorsement—Actions.—Where one sues on a note indorsed in blank by the payee, his possession is *prima facie* evidence of his right to sue, and can be rebutted only by proof of *mala fides*.—JONES v. BUTLER, Tex., 42 S. W. Rep. 361.

13. BANKS AND BANKING — Insolvency—Deposits.—Where a statute prohibits the doing of an act, or imposes a duty upon one, for the protection and benefit of individuals, if he disobeys the prohibition, or neglects to perform the duty, he is liable, to those for whose protection the statute was enacted, for any damages resulting proximately from such disobedience or neglect.—BAXTER v. COUGHLIN, Minn., 72 N. W. Rep. 797.

14. BILLS AND NOTES — Contemporaneous Agreements.—Independent, collateral written agreements, though executed at the same time with a promissory note, do not affect the construction of such note, or afford any defense to an action upon it.—AMERICAN GAS & VENTILATING MACH. CO. v. WOOD, Me., 38 Atl. Rep. 548.

15. BILLS AND NOTES — Consideration.—There is no failure of consideration for notes given as payment for property sold and delivered by an assignee for benefit of creditors, merely because the assignee has not reported the sale and the court has not confirmed it; the sale and delivery being, at least, not void.—BREYFOGLE v. STOTSENBURG, Ind., 47 N. E. Rep. 1057.

16. BILLS AND NOTES—Liability on Indorsement of Check.—Where the payee of a check indorses it in blank, as between him and his indorsee, he is liable on his indorsement strictly, and cannot be relieved by showing facts not indicated by the written contract.—AURORA NAT. BANK v. DILS, Ind., 48 N. E. Rep. 19.

17. BILLS AND NOTES — Pension Certificate.—A pension certificate or check drawn to the order of a person then deceased is absolutely void.—UNITED STATES v. FIRST NAT. BANK OF COFFEYVILLE, U. S. C. C., D. (Kan.), 82 Fed. Rep. 410.

18. CARRIERS OF GOODS — Connecting Carriers.—Where a contract of shipment is for through transportation over a designated route, and beyond the lines of the initial carrier, each of the companies on that route accepting the freight under the contract becomes subject to the initial carrier's liabilities, and entitled to its legal exemptions under the contract.—BIRD v. SOUTHERN RY. CO., Tenn., 42 S. W. Rep. 451.

19. CARRIERS OF PASSENGERS—Negligence.—It is not negligence, *per se*, for a railroad company to have attached to its passenger train one or more vestibule cars whose doors are closed and locked.—CLEVELAND, C., C. & ST. L. RY. CO. v. WADE, Ind., 48 N. E. Rep. 12.

20. CONSTITUTIONAL LAW — Interstate Commerce — Validity of State Laws.—To render a State statute void on the ground that it affects commerce between the States, it must involve some discrimination against goods shipped from other States, or against persons engaged in such commerce.—IN RE MAY, U. S. C. C., D. (Mont.), 82 Fed. Rep. 422.

21. CONSIDERATION — Guarantors. — An agreement, made without consideration, changing the time of delivery in a contract of sale, is void, and hence cannot release the guarantor of the contract. — SLAUGHTER v. MOORE, Tex., 42 S. W. Rep. 372.

22. CONTRACT — Horse Racing. — In an action to recover an unpaid trotting premium claimed to have been won by the plaintiff's horse in a horse race conducted by the defendant, held, that the judges constituted the tribunal to which the parties submitted when they entered their horses for the race; and by their decision, if honestly given, the parties are bound. —WELLINGTON v. MONROE TROTTING PARK CO., Me., 38 Atl. Rep. 543.

23. CONTRACT — Interpretation. — One C desiring to borrow a sum of money from his wife, she raised it on mortgage of property belonging to her, C signing the bond with her; but she refused to execute the mortgage until C signed an instrument by which he recited the loan from his wife, agreed that, if he should die before her, the sum procured should be a charge on his estate, and that his representatives should also convey to his wife certain real estate, with a proviso that, if she should not survive him, the agreement should be of no effect. C's wife having died before, him her executor sued him to recover the amount of the loan: Held that C's wife did not, by accepting the agreement, promise to release the debt if she died before her husband; and, his agreement having become of no effect by her death, the parties were remitted to such obligations as arose from the loan and the failure to repay it, as if the agreement had never been made. — LORD v. CRONIN, N. Y., 47 N. E. Rep. 1088.

24. CONTRACT — Modification by Oral Agreement. — Where a written contract has been assigned, and the terms of the assignment in writing are the same as the original, it is not competent to introduce evidence of the oral contract which would annul or set aside the terms of the written contract, when it appears that the alleged oral contract was made at the time, or prior, and which led up to the making of the written assignment of the contract. — MOYLE v. CONGREGATIONAL SOC. OF SALT LAKE CITY, Utah, 50 Pac. Rep. 806.

25. CORPORATIONS — Appropriation of Assets — Individual Indebtedness.—One who receives checks of a corporation, executed by its secretary and treasurer in payment of his individual indebtedness, is liable to the corporation for the amount thereof, unless he shows that the corporation either directly or inferentially assented thereto.—MT. VERD MILLS CO. v. MCELWEE, Tenn., 42 S. W. Rep. 465.

26. CORPORATIONS — Insolvency — Preferences. — A solvent corporation may make preferred payments to creditors represented on its board of directors.—SOUTH BEND CHILLED PLOW CO. v. GEORGE C. CRIBB CO., Wis., 72 N. W. Rep. 749.

27. CORPORATION — Resulting Trusts — Illegal Contracts.—He in whose name stock was placed to evade Gen. Laws, ch. 148, § 18, prohibiting stockholders from voting on more than one-eighth of the whole number of shares in the corporation, and to enable him to be a director of the corporation, in violation of a by-law requiring ownership of stock to enable one to be a director, may subsequently make a valid agreement that the stock belonged to the real owner thereof, and that he would convey it to him upon request. — SCOTT v. SCOTT, N. H., 38 Atl. Rep. 567.

28. COUNTY OFFICERS—Salaries—Mandamus.—St. 1885, p. 85, § 21, provides that "the States shall allow the several counties, for services rendered, under the revenue act, by the auditor, assessor and treasurer of

each county, a sum which shall be the proportion of the State tax to the whole tax levied by the county on the basis of the salaries allowed:" Held, that where the county clerk was *ex officio* county treasurer, and was allowed one salary for both offices, the State could not be compelled to make the county an allowance on the basis of his entire salary, since that would make the State pay part of the salary of the county clerk. — STATE V. LA GRAVE, Nev., 50 Pac. Rep. 796.

29. COUNTIES—Bridges — Liability.—A county chargeable with knowledge of defects in the railing on an approach to a county bridge, is liable for injuries of which the defective railing was the proximate cause.—FAULK V. IOWA COUNTY, Iowa, 72 N. W. Rep. 757.

30. COUNTIES — Subscriptions to Stock. — Where the county court, under color of an election authorizing a subscription of $150,000 to the stock of a certain railroad company, to be paid for by the bonds of the county, issued bonds in the sum of $100,000 on account of such subscription, such act was not merely *ultra vires*, but in violation of the constitutional provision forbidding all municipal subscriptions to railroad corporations except where authorized under existing laws by a vote of the people, and therefore void. — STEBBINS V. PERRY COUNTY, Ill., 47 N. E. Rep. 1048.

31. COURTS - Jurisdiction — Indian Contract.—A State court has jurisdiction of an action on a contract made in the Indian Territory between residents thereof, one of whom (defendant) is a Cherokee Indian, the other (plaintiff) a white man married in the State, according to its laws, to a Cherokee woman, and carrying on a mercantile business in the territory, defendant having been served with summons and appeared in the case; though, under the Cherokee law, one marrying into the Cherokee Nation, as provided in that law, becomes a member of the Nation, and though there is no Indian law authorizing a non citizen to do business in the Cherokee Nation.—STEVENSON V. CHRISTIE, Ark., 42 S. W. Rep. 418.

32. CRIMINAL EVIDENCE — Rape.—A witness who has testified as to the defendant's good character for chastity may be asked on cross-examination whether he ever heard of defendant "being too thick with" a certain woman not connected with the case on trial.—FORRESTER V. STATE, Tex., 42 S. W. Rep. 400.

33. CRIMINAL LAW Breaking Jail — Escape. — Under Pen. Code 1895, art 227, which declares that, "if any person shall break into any jail for the purpose of effecting the rescue or escape of a prisoner therein confined," he shall be punished, it is not necessary to show that the prisoner was legally confined.—STARKS V. STATE, Tex., 42 S. W. Rep. 379.

34. CRIMINAL LAW — False Pretenses. — Where an indictment charged defendant with falsely representing to one S that she had prositive evidence that a specified sum belonging to H was deposited in a certain bank, and that she had made an arrangement whereby, on payment of $5,000 to her by S, the president of said bank would hold the deposit subject to attachment in a suit then pending against H by S's daughter, an allegation that defendant had secured no such evidence, and had made no such arrangement, as she then and there well knew, was sufficient, without averring that H had not such sum on deposit. — COMMONWEALTH V. SESSIONS, Mass., 47 N. E. Rep. 1034.

35. CRIMINAL LAW - Homicide — Indictment.—An indictment charging that defendant "did, with his express malice aforethought, kill and murder," etc., is sufficient to sustain a conviction for murder in the second degree, since an indictment for murder in the first degree includes all minor grades of felonious homicide.—RIPTOE V. STATE, Tex., 42 S. W. Rep. 381.

36. CRIMINAL LAW—Larceny by Trustee.—A bill of indictment charging the accused with larceny after a trust delegated, in that he, being intrusted by the prosecutor with money for the purpose of holding and keeping the same for the bailor, fraudulently converted the same to his own use, sufficiently sets out an offense in contemplation of the statute, and contains sufficient grounds to show a delegated trust. It is not necessary that any other disposition of the money be alleged than its fraudulent conversion by the bailee to his own use.—CODY V. STATE, Ga., 28 S. E. Rep. 106.

37. CRIMINAL LAW — Rape. — Where the sole witness for the State of the prosecutrix, and her evidence shows that defendant drove her in his buggy through a village, meeting a number of people, before he took her to the woods, where they had intercourse; that she made no outcry on the way, although she knew his intention; and that she made no complaint for several weeks after the event,—the evidence is not sufficient to sustain a conviction. — KENNON V. STATE, Tex., 42 S. W. Rep. 876.

38. CRIMINAL LAW—Seduction — Offer to Marry.—Under 1 Hill's Ann. Laws, § 1863, making a subsequent marriage of the parties a defense to a prosecution for seduction, an unaccepted offer to marry, made by defendant after his indictment, is insufficient. — STATE V. WISE, Oreg., 50 Pac. Rep. 800.

39. DEATH BY WRONGFUL ACT — Damages.—A widow cannot recover for mental or physical suffering occasioned by the wrongful killing of her husband, under Shannon's Code, § 4029, providing that in such cases plaintiff may recover "damages." — KNOXVILLE, C. G. & L. R. CO. V. WYRICK, Tenn., 42 S. W. Rep. 484.

40. DECEIT—Reliance on False Representations. — A tenant testified that before the leasing of a farm he and the landlord's agent went to examine the farm, but that they found it too muddy to go over it, and so he relied on the agent's statement as to the number of acres under cultivation: Held, proper to submit a question to the jury as to whether the tenant acted with due care in relying on such statement. — LADNER BALSLEY, Iowa, 72 N. W. Rep. 787.

41. DEED — Description — Boundaries. — Plaintiff claimed title to the premises demanded under three mortgages of different date, the last two of which have been foreclosed; defendant, under a fourth mortgage from same mortgagors, and also under a deed from the assignees of the mortgagors, in which the mortgagors join,—the description in the deed being such, as the defendant contended, as to embrace a larger tract than that covered by the plaintiff's mortgages. — SMITH V. SWEAT, Me., 38 Atl. Rep. 554.

42. DEED — Married Woman's Acknowledgment.—Acknowledgment, in due form, of a married woman, to a trust deed of property owned by her and her husband in entireties, will not be set aside, when attacked by her, four years after it was made on her testimony that she did not know the contents of the deed, that it was never read to her, and that the notary did not explain it to her; it being admitted by her that she knew her husband was going to borrow the amount of money for which it was given as security, and that it was being executed for that purpose, and that her husband told her that, but alleged by her that he said nothing about either of their shares being signed away; and it appearing that, while the notary did not read or state its contents to her, he stated that it was a deed of trust, whereupon she replied that she knew about it, and at once prepared to sign it; the statute merely requiring that one taking a married woman's acknowledgment shall examine her touching her knowledge of its contents and effect, and, if satisfied that she fully understands it, may take her acknowledgment.—RONNER V. WELCKER, Tenn., 42 S. W. Rep. 489.

43. DEED—Powers of Attorney.—Four persons having taken steps to procure title, as tenants in common, to a section of land, one of them executed a power of attorney authorizing the attorney to convey an undivided one-fourth of such section. By an error or oversight of the land office, title was made to each of a quarter section in severalty. Thereafter each of the grantees made conveyances of their quarter sections to a third party, who then reconveyed to each of them an undivided one-fourth interest in the whole section. Thereafter the attorney, under the power of attorne

executed a conveyance of an undivided one-fourth interest in the entire section: Held, that this was an effectual conveyance of such undivided interest, as it carried out the clear intent of the parties at the time it was given.—GRATZ v. LAND & RIVER IMP. CO., U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 381.

44. DIVORCE — Award of Alimony — Jurisdiction.—A decree of divorce was entered by a circuit court of South Dakota in favor of plaintiff, a resident of that State, against defendant, a resident of Massachusetts; the court having no jurisdiction of defendant. Defendant afterwards married, and subsequently, on an amended bill filed by plaintiff, by leave of the court, without notice or attempted notice to the defendant, a decree was entered awarding plaintiff alimony: Held, that such decree was void, and an action based thereon to recover the alimony could not be maintained.—HEKKING v. PFAFF, U. S. C. C., D. (Mass.), 82 Fed. Rep. 403.

45. EJECTMENT — Claim for Improvements.—After plaintiff in ejectment has recovered on his legal title, defendant cannot bring an independent suit in equity for the value of improvements made by him while in possession; such claim being enforceable, if at all, in the ejectment suit, or by way of defense to any action for mesne profits.—FCICKE v. SAFE-DEPOSIT & TRUST CO., Penn., 38 Atl. Rep. 601.

46. EMINENT DOMAIN—Riparian Rights — Compensation.—While the general rule prevents any disturbance of riparian rights by public authority, past or present, without making compensation, it is the rule in New York, when the interests of the whole people require an improvement of the water front of a navigable stream for the benefit of commerce, for the State, or the city of New York by permission of the State, to make such improvements upon the tide-water front without compensating the riparian proprietor, except by giving him a pre-emptive right to purchase in case of a sale.—SAGE v. MAYOR, ETC. OF CITY OF NEW YORK, N. Y., 47 N. E. Rep. 1096.

47. EQUITABLE ASSIGNMENT—What Constitutes.—One procuring a loan from an agent of the lender for the purpose of discharging a debt of the same amount due by him to a third party, on executing the note and mortgage verbally directed the agent to pay over the money, when received from his principals, to such third party; and the latter, on learning of the arrangement, assented to it: Held, that this was an equitable assignment of the fund.—LEONARD v. MARSHALL, U. S. C. C., W. D. (Mo.), 82 Fed. Rep. 396.

48. EXECUTION SALES—Rights of Purchasers.—A purchaser at execution sale takes subject to the rights of the parties as they shall be adjudicated in the action then pending, and by virtue of which the property is sold.—MANNING v. FERGUSON, Iowa, 72 N. W. Rep. 762.

49. EXECUTION — Interest of Joint Owner.—Property owned jointly or by a partnership may be levied on by a creditor of one of the partners or joint owners, and his interest sold, without resort to equity being first had.—JONES v. RICHARDSON, Tenn., 42 S. W. Rep. 440.

50. FEDERAL COURTS—Suit in Wrong District.—The filing of a general appearance in a federal court in an action commenced by service of summons alone is no waiver of defendant's right to move to dismiss for want of jurisdiction, when, on the subsequent service of the complaint, it for the first time appears that the only ground of federal jurisdiction is diverse citizenship, and that the action is brought in the wrong district.—CROWN COTTON MILLS CO. v. TURNER, U. S. C. C., S. D. (N. Y.), 82 Fed. Rep. 339.

51. FRAUDS, STATUTE OF—Land Contracts—Waiver.—Where defendant pleads the statute of frauds to an action on an oral land contract, and plaintiff alleges facts which, if established, would show the contract to be within some of the exceptions to the statute, defendant does not waive his right to rely on the statute by failure to object to proof of the contract at the time it is offered, and before plaintiff, with whom the order in which he shall introduce his evidence is discretionary, has endeavored to show that the contract is within the exceptions pleaded.—BENEDICT v. BIRD, Iowa, 72 N. W. Rep. 768.

52. GIFT—Note — Consideration.—A note executed without consideration is not enforceable, as between the donee and donor, or his estate, as a gift *inter vivos*, nor as a gift *causa mortis*.—TRACY v. ALVORID, Cal., 50 Pac. Rep. 757.

53. GUARDIANS — Power to Borrow Money.—A guardian has no power, without sanction of the orphans' court, to borrow money for the improvement of the ward's real estate, and pledge the bank stock of the ward as security for the loan.—IN RE HIND'S ESTATE, Penn., 38 Atl. Rep. 599.

54. HIGHWAYS — Rights of Abutting Owners.—Whenever public necessity or convenience requires that the whole of a highway, or any portion greater than that previously traveled, should be built as a road for public travel, the duty and exclusive authority for doing such work as may be necessary for such purpose is given by statute to road commissioners or highway surveyors.—BURR v. STEVENS, Me., 38 Atl. Rep. 547.

55. HOMESTEAD—Conveyance by Husband.—Where a husband, without his wife joining, conveys part of the land selected by him for a home, and occupied as such, and the value of the remaining portion is less than $1,000, the wife may recover a homestead in the tract so conveyed, though the husband still owns other lands worth more than that sum.—COTTREL v. ROGERS, Tenn., 42 S. W. Rep. 445.

56. HOMESTEAD—Conveyance—Registration of Deed.—Under Const. art. 11, § 11, and the Code, a husband and wife can convey their homestead only by joint deed.—COX v. KEATHLEY, Tenn., 42 S. W. Rep. 437.

57. HUSBAND AND WIFE—Preferring Claim of Wife.—An assignment of property by one to his wife, who had a separate estate, and had given therefrom to him more than he assigned to her, is valid against his creditors.—IN RE JAMISON'S ESTATE, Penn., 38 Atl. Rep. 604.

58. HUSBAND AND WIFE — Separation Agreements—Effect as Release.—While proceedings were being had for an absolute divorce and a division of their property, husband and wife entered into a contract of separation which assumed to equally divide all their property, and contained a proviso that each released the other "from all obligations and liability for the future acts and debts of each other:" Held, not to constitute a release by either of the right to succeed to the estate of the other.—IN RE JONES' ESTATE, Cal., 50 Pac. Rep. 767.

59. INSANE PERSONS—Constitutional Law.—An insane person, who was committed to a hospital, under the provisions of Pub. St. ch. 87, §§ 12, 13, on application of his daughter, by the special justice of the police court of the city where he resided,—being entitled, as a matter of right, to institute judicial proceedings, under sections 40 44, to determine the necessity and propriety of his confinement,—was not thereby denied the same protection of the laws which is enjoyed by all other persons in the commonwealth under like circumstances, and was not therefore deprived of liberty without due process of law.—IN RE DOWDELL, Mass., 47 N. E. Rep. 1033.

60. INSOLVENCY—Respite.—The failure of a party applying for a respite to deposit in the office of the clerk of the court of his domicile, to whom he presents his petition for calling his creditors, a true and exact schedule, sworn to by him, of all his immovables as well as his debts, warrants the court in rejecting the application.—DREW v. HIS CREDITORS, La., 22 South. Rep. 780.

61. INSURANCE—Condition against Other Insurance.—Knowledge by the agent of an insurance company, at the time of procuring the insurance, that the insured intended to take out other insurance, does not operate as a waiver of a condition in the policy subse-

quently delivered, forbidding other insurance, except by consent of the insurance company indorsed on the policy. The rule that a prior parol understanding or agreement cannot control a subsequent contract applies, and the waiver, to be effectual, must be subsequent to the written contract, and must be made, not only with knowledge of the other insurance, and with intent to waive the condition, but must be supported by a valuable consideration, or become operative by way of estoppel.—UNITED FIREMAN'S INS. CO. v. THOMAS, U. S. C. C. of App., Seventh Circuit, 82 Fed. Rep. 406.

62. INSURANCE—Policy Payable to Mortgagee.—Where a fire policy, issued on application of the owner of the insured property, is payable, in case of loss, to a mortgagee, as his interest may appear, and such owner burns the property to realize on the policy, there can be no recovery on it for the use of the mortgagee.—HOCKING v. VIRGINIA FIRE & MARINE INS. CO., Tenn., 42 S. W. Rep. 451.

63. INTERSTATE COMMERCE LAW—Powers of Commission. — The interstate commerce commission has no power to prescribe rates, either maximum, minimum, or absolute; nor can it effect the same result indirectly, by first determining what were reasonable and just rates in the past, and then procuring from the courts a peremptory order that in the future the carrier shall follow those rates. — INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND RY. CO., U. S. S. C., 18 S. C. Rep. 45.

64. INTERSTATE COMMERCE—Regulation of Switching Charges.—The power of congress to regulate interstate commerce extends to the necessary switching of cars and delivery at terminal points; and an action to recover penalties imposed by a State statute upon carriers for discrimination between individuals in regard to terminal facilities cannot be maintained with respect to freight brought from another State, as that matter is covered by a federal statute. — FIELDER v. MISSOURI, K. & T. RY. CO. OF TEXAS, Tex., 42 S. W. Rep. 362.

65. INTOXICATING LIQUORS — Illegal Sale. — It is not necessary, in an indictment under sections 1993, 2029, Gen. St. 1894, for selling intoxicating liquors without a cense, to negative the proviso in section 2029 to the effect that the provisions of the section shall not be construed so as to prohibit druggists from dispensing liquors in filling physicians' prescriptions. — STATE v. CORCORAN, Minn., 72 N. W. Rep. 732.

66. INTOXICATING LIQUORS — Local Option.—Under a local option statute providing for the submission to the people of the mere issue "For prohibition," or "Against prohibition," it is not necessary that the order authorizing the election should contain the statutory exceptions in favor of sales for medicinal and sacramental purposes.—SHIELDS v. STATE, Tex., 42 S. W. Rep. 398.

67. JUDGMENT—Joint Warrant of Attorney.—Under a joint warrant of attorney annexed to a joint note, a judgment cannot be entered against one of the makers alone.—KAHN v. LESSER, Wis., 72 N. W. Rep. 739.

68. LANDLORD AND TENANT — Defective Premises—Independent Contractor. — A landlord cannot escape his duty to exercise reasonable care to occupying tenants by placing the work of making repairs and improvements in the hands of an independent contractor. — WILBER v. FOLLANSBEE, Wis., 72 N. W. Rep. 741.

69. LANDLORD AND TENANT — Tenancy at Will. — A tenancy at will is terminated by the alienation of the premises by the landlord, and without giving the tenant the notice provided for in Rev. St. ch. 94, § 2. — SEAVEY v. CLOUDMAN, Me., 38 Atl. Rep. 540.

70. LIMITATION OF ACTIONS—Revivor of Judgments.—Where the legislature passes a statute of limitation barring the revivor of judgments by *scire facias* after the lapse of ten years from their rendition, and provides further that the act shall take effect and be in force from and after one year from the date of its passage, held, that the act applies to existing as well as future judgments, and that past judgments, which have been rendered more than ten years, are barred unless the *scire facias* is issued within one year from the date of the passage of the act. — WRIGHTMAN v. BOONE COUNTY, U. S. C. C., W. D. (Ark.), 82 Fed. Rep. 412.

71. MANDAMUS—Alternative Writ.—Where an alternative writ has been issued in a *mandamus* proceeding, if the facts in the application are sufficient to entitle the applicant to the peremptory writ a demurrer addressed to the alternative writ alone, or to both the writ and application, should be overruled.—WAMPLER v. STATE, Ind., 47 N. E. Rep. 1069.

72. MARRIAGE BY DIVORCED PERSON — Validity.—The marriage of a person domiciled in Oregon, contracted in violation of 1 Hill's Ann. Laws, § 503, providing that neither party to a decree of divorce "shall be capable of contracting marriage with a third person" pending an appeal from said decree or during the time in which an appeal may be taken, is absolutely void, when called in question in the courts of Oregon, though solemnized in another State.—MCLENNAN v. MCLENNAN, Oreg., 50 Pac. Rep. 802.

73. MASTER AND SERVANT — Fellow-Servants. — What constitutes the relation of fellow-servant is matter for the court, but whether, in a particular case, the employees sustained that relation, is a question for the jury under the instructions of the court. — WILSON v. CHARLESTON & S. RY. CO., S. Car., 28 S. E. Rep. 91.

74. MASTER AND SERVANT — Grounds for Discharge—Employment. — Evidence that an hotel manager was absent from the hotel almost every afternoon, and that his employers had called to see him at the hotel office five or six times, but had not found him, is not sufficient to warrant a discharge for neglect of duty, where it was part of the manager's duty to collect and to solicit business, and he testified that he was rarely out during the afternoon except on business for the hotel, and no complaint was made to him by his employers about his absences. — WYATT v. BROWN, Tenn., 42 S. W. Rep. 479.

75. MASTER AND SERVANT — Injuries to Employee — Negligence.—Though it be not the duty of the operator of a coal mine, as respects an employee, to prop the roof to prevent its falling, where it assumes that duty, and does so in such a careless manner that the roof is rendered more liable to fall, and an employee, while in the exercise of due care, is injured by the falling roof, the operator is not relieved of liability by the act providing for the safety of persons employed in coal mines, and which requires (section 16) only that the operator shall keep a sufficient supply of timber, where required to be used as props, so that the workmen may be able to properly secure the said workings from caving in.—CONSOLIDATED COAL CO. OF ST. LOUIS v. SCHEIBER, Ill., 47 N. E. Rep. 1052.

76. MECHANICS' LIENS — Continuous Contracts. — Though the complaint of a material-man to foreclose a mechanic's lien does not state that all the material was furnished under one continuous contract, he is entitled to relief as to items furnished within the 60 days from the time of filing his notice of intention to claim the lien. — INDIANA MUT. BUILDING & LOAN ASSN. v. PAXTON, Ind., 47 N. E. Rep. 1082.

77. MORTGAGES—Default—Right of Entry. — After default in the conditions of a registered mortgage, the mortgagee can, by contract, become landlord of the mortgagor, so as to avail himself of the landlord's lien; subsequent lienors being charged with knowledge of the mortgagee's right of entry. — FORD v. GREEN, N. Car., 28 S. E. Rep. 182.

78. MORTGAGE — Judicial Sales — Foreclosure. — The trustee in a mortgage undertook to foreclose it, and the mortgagee purchased at the sale, which was void, as against the mortgagor, for want of service on him: Held, that the rule that a purchaser at a void foreclosure sale becomes the assignee of the mortgage, by operation of law, would not be applied against the mortgagee, so as

to preclude the trustee from subsequently suing to subject the property to the payment of the mortgage, especially as the sale was set aside at the instance of the mortgagor.—JENNINGS v. PARR, S. Car., 28 S. E. Rep. 82.

79. MORTGAGES—Limitations — Contractual Rights.—Act March 25, 1889, §§ 1, 2 (Sand. & H. Dig. §§ 5094, 5095), provide that mortgages shall be subject to the same limitation as to time as is applicable to the evidence of debt thereby secured, require a payment which would extend the period of limitations to be indorsed on the margin of the record of the mortgage, and allow one year from the date of the passage of the act for the foreclosure of mortgages which would otherwise be barred by its provisions in less than one year: Held, that the act is not unconstitutional, as impairing the obligation of antecedent contracts.—HILL v. GREGORY, Ark., 42 S. W. Rep. 408.

80. MORTGAGES — Priority — Recording.—Under Rev. St. 1894, § 3350 (Rev. St. 1881, § 2931), requiring every mortgage to be recorded, and declaring that, when not recorded in 45 days from execution, it shall be void as against a subsequent *bona fide* mortgagee, the second mortgage, duly recorded, takes precedence of the first mortgage, not recorded within 45 days of its execution, though the second mortgage was executed within such 45 days.—CARSON v. EICKHOFF, Ind., 47 N. E. Rep. 1067.

81. MUNICIPAL CORPORATIONS — Constructing Sidewalk.—Where an ordinance authorizes the city council to order the construction of a sidewalk, by resolution which shall be served on the adjoining lot owners, and provides that, in case the owner fails to construct the walk within the time fixed, the work shall be done on contract at his expense, service of the resolution is a condition precedent to the right to have the walk constructed at the expense of the lot owner. — HAWLEY v. CITY OF FT. DODGE, Iowa, 72 N. W. Rep. 756.

82. MUNICIPAL CORPORATIONS — Contracts — Charter Powers. — Though San Diego City Charter, ch. 5 (St. 1889, p. 664), conferred on the common council power to employ special counsel, either by joint resolution or by ordinance, a resolution providing for such employment, and specifying the terms thereof, which was adopted without having indorsed thereon or attached thereto a certificate of the auditor that the liability thereby created could be incurred without violating any of the provisions of the charter, as required by charter provision (St. 1889, p. 659, § 14), was void. — POLLOK v. CITY OF SAN DIEGO, Cal., 50 Pac. Rep. 769.

83. MUNICIPAL OFFICERS — Appointment and Removal. — An appointment made to an office by a city council at a time when the office has been declared not vacant by the supreme court, and made without first removing the incumbent declared to be legally entitled thereto, is void. — MCALLISTER v. SWAN, Utah, 50 Pac. Rep. 812.

84. NEGLIGENCE — Proximate Cause. — Negligence is the proximate cause of an injury only when the injury is the natural and probable result of such negligence, and, in the light of the attendant circumstances, ought to have been foreseen by a person of ordinary intelligence and prudence. — DRISENRIETER v. KRAUS-MERKEL MALTING CO., Wis., 72 N. W. Rep. 735.

85. OFFICERS—De Facto and De Jure Officers.—Where the incumbent of a municipal office, filled by appointment of the mayor with the consent of the common council, is wrongfully removed by the council, and another placed in his position by the mayor, without the council's consent, the appointee is a mere intruder, and not an officer *de facto;* and hence payment of the office salary to him does not relieve the city from liability therefor to the *de jure* officer.—KEMPSTER v. CITY OF MILWAUKEE, Wis., 72 N. W. Rep. 743.

87. PARTNERSHIP—Firm Debts — Evidence.—Certain book entries of a new firm indicated that it assumed the debt of one of its members to a member of the old rm for the price of his interest in assets of the old m that became assets of the new firm, but the members of the new firm denied that it assumed such debt, and stated that said entries were made simply for convenience. Said old firm member had sued the new firm member, who purchased his interest for the debt, and had obtained a judgment without making the other member of the new firm a party: Held, the new firm did not assume said debt.—BROWNLEE v. LOBENSTEIN, Tenn., 42 S. W. Rep. 467.

88. PLEADINGS—Supplemental Petition.—In an action to recover damages for injury to property, resulting from the maintenance of a nuisance, a claim for additional damages accruing since the commencement of the action, from a continuance of the same nuisance, may be set up by supplemental petition.—FOOTE v. BURLINGTON GASLIGHT CO., Iowa, 72 N. W. Rep. 755.

89. PLEDGE OF NOTES—Action by Pledgor.—The fact that a party had transferred certain notes held by him to another person as collateral did not withdraw entirely from him the power of protecting his interests by proceeding against the maker of the notes.—O'KELLEY v. FERGUSON, La., 38 Atl. Rep. 783.

90. PRINCIPAL AND AGENT — Knowledge of Agent.—Where a homestead is conveyed by husband and wife to enable the grantee to procure a loan for the husband in avoidance of the homestead laws, with the understanding that the property shall thereafter be reconveyed, one who lends money to the grantee, and takes a mortgage on the land as security, is chargeable with the knowledge of his agent, who acted for him in the negotiation for the loan, as to the simulated character of the transaction, in the absence of any evidence that such agent colluded with the other parties to defraud his principal.—PEOPLE'S BUILDING, LOAN & SAVING ASSN. v. DAILEY, Tex., 42 S. W. Rep. 365.

91. PRINCIPAL AND SURETY — Discharge of Surety.—A written notice sent by a surety on a note to the payee, informing him that the writer signed as surety only, and concluding, "Under no consideration will I consent to a prolongation of said note, and hereby request you to use every effort to collect" the same from the other signers, only one of whom had signed as principal, was a notice requiring the payee to sue; and, on his failure to do so within the statutory period, said surety was discharged.—SULLIVAN v. DWYER, Tex., 42 S. W. Rep. 355.

92. PRINCIPAL AND SURETY—Loans.—Sureties paid to their principal sums necessary to meet payments on the note they had guarantied as they became due. The principal at once paid such sums to its creditor, and new notes were executed by it and the sureties to the creditor, and thereupon the principal gave his note to each surety for the amount then paid by him: Held, that such payments were not loans to the principal, but were payments for the benefit of the creditor.—BRAY v. FIRST AVE. COAL MIN. CO., Ind., 47 N. E. Rep. 1073.

93. QUIETING TITLE.—Under Rev. St. 1894, § 251 (Rev. St. 1881, § 251), requiring every action to be prosecuted in the name of the real party in interest, a grantor by warranty deed cannot maintain suit in his own name, to quiet title, against third persons claiming an interest in the land paramount to that conveyed to the grantee.—CHAPMAN v. JONES, Ind., 47 N. E. Rep. 1065.

94. RAILROAD COMPANY—Accidents at Crossings.—In an action for the death of plaintiff's intestate at a railroad crossing, the court, after defining "negligence," and instructing the jury that they were to decide the question, said: "You fix the standard of reasonable, prudent, and cautious men, under the circumstances of the case, as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved, and try it by that standard; and neither the judge who trys the case, nor any other person, can supply you with the criterion of judgment by any opinion he may have on that subject:" Held misleading, as authorizing the jury to fix its own standard of negligence and ordinary care.—ST. LOUIS, I. M. & S. RY. CO. v. SPEARMAN, Ark., 42 S. W. Rep. 406.

95. RAILROAD COMPANIES—Bridges.—Rev. St. 1894, § 5153, cl. 5 (Rev. St. 1881, § 3903), empowers a railroad company to construct its road upon or across any stream or highway "in such manner as to afford security for life and property;" but it requires the company to restore the intersected stream or highway to its former state, "or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises:" Held, that the "life and property" and the "franchises" referred to, are not those of the railroad company, but those connected with the intersected stream or highway.—NEW YORK, C. & ST. L. R. CO. v. HAMLET HAY CO., Ind., 47 N. E. Rep. 1060.

96. RAILROAD COMPANY—Defective Appliances—Negligence.—A railroad track curved somewhat on a bridge, so that at one corner the ends of bolts in a truss at the side of the bridge would be only 15 inches from a car. It was the duty of brakemen on freight trains to loosen hand brakes while near and passing over the bridge, and plaintiff, while going down a ladder on a car, in discharge of such duty, was struck by said bolts: Held, that he could recover damages.—BRYCE v. CHICAGO, ETC. RY. CO., Iowa, 72 N. W. Rep. 780.

97. RAILROAD COMPANY — Illegal Construction Contract.—A contract by which certain directors of a street-railway company, acting in the name of a third person, who is a mere dummy, are to construct the road, and divide between them the balance of the stock and bonds not required therefor, is fraudulent, and bonds issued pursuant thereto are void.—VANDERVEER v. ASBURY PARK & B. ST. RY. CO., U. S. C. C., D. (N. J.), 82 Fed. Rep. 355.

98. RAILROAD COMPANY—Injuries to Persons on Track.—A railroad company owes no duty to a trespasser on its tracks until its employees actually see him on the track in a place of danger.—THOMAS v. CHICAGO, ETC. RY. CO., Iowa, 72 N. W. Rep. 783.

99. RAILROAD COMPANY — Receivers.—A court of equity, when called upon to appoint a receiver of railroad property, with power to operate the road and conduct its business, pending a foreclosure suit, may, in the exercise of its judicial discretion, as a condition of issuing the order, direct the receiver, out of money coming to his hands from such business, to pay the outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property, as may under the circumstances of the order be reasonable.—CENTRAL TRUST CO. OF NEW YORK v. UTAH CENT. RY. CO., Utah, 50 Pac. Rep. 813.

100. RAILROAD COMPANY — Receivers.—A court of equity does not take possession of a railroad for the purpose of performing the contracts of the company, but solely to preserve and protect the property, and to keep the company a going concern, pending the settlement of claims against it; and where the earnings are not sufficient to pay all its creditors after paying operating expenses, and keeping the property in safe condition for operation, they will be applied to the payment of creditors who hold liens or contracts which, if unpaid, they are entitled to enforce, and the enforcement of which will endanger the integrity of the property.—MERCANTILE TRUST CO. v. BALTIMORE & O. R. CO., U. S. C. C., D. (Md.), 82 Fed. Rep. 360.

101. RAILROAD COMPANY—License — Negligence.—A depot platform had at the north end steps for the use of the public, and at the south an apron from the ground for the same purpose. There was a well defined footpath going from the public street across the track to the platform. It would not have been proper to have the grounds fenced, nor could the path have well been obstructed: Held, that the railroad company gave no license or invitation to any one to approach the track by the path, and cross the track to the east side of the platform, so as to render it liable to a person injured in so doing, without negligence on its part.—HEISS v. CHICAGO, ETC. RY. CO., Iowa, 72 N. W. Rep. 787.

102. RECEIVERS — Appointment and Removal—Nonresidence.—A receiver appointed by a federal court in New Jersey for a New Jersey manufacturing corporation whose plant and business are located in Ohio, and subsequently appointed on the commencement of an ancillary suit, by a federal court in Ohio, will not be removed by the latter court on the application of mortgage creditors who have subsequently become parties, merely on the ground that he is a non-resident of Ohio, where it appears that he is a fit person to manage the business, and intends to give it his personal supervision.—BAYNE v. BREWER POTTERY CO., U. S. C. C., N. D. (Ohio), 82 Fed. Rep. 391.

103. RES JUDICATA—Sureties on Bond.—Sureties upon a probate bond are, in the absence of fraud, concluded by the decree of the proper court rendered upon an accounting by their principal, as to the amount of the principal's liability, even though the sureties be not parties to the accounting.—MEYER v. BARTH, Wis., 72 N. W. Rep. 748.

104. SALES—False Representations — Rescission.—Plaintiff bought diseased hogs from defendant, who had represented them as sound, and, on learning the facts, sued to rescind the contract: Held, that plaintiff was entitled to relief, without regard to whether the representations were innocently or fraudulently made.—CARTER v. COLE, Tex., 42 S. W. Rep. 369.

105. SALES — Rescission for Fraud.—Plaintiff, by means of fraudulent representations, induced defendant, who believed the representations, to buy a new piano, for which she gave an old piano and $10 in part payment, and executed a contract whereby the title, ownership, and possession of the piano remained in the plaintiff. Defendant, upon discovery of the fraud, offered to rescind the contract and return the piano upon return to her of the old piano and the $10, which plaintiff did not do: Held, that plaintiff could not maintain an action for recovery of the piano.—MYERS v. TOWNSEND, Iowa, 72 N. W. Rep. 761.

106. SALE—Title—Delivery.—The general rule is that as between seller and purchaser, and as against strangers and trespassers, the title to personal property passes by sale without delivery, when no question arises in relation to the statute of frauds.—CUMMINGS v. GILMAN, Me., 38 Atl. Rep. 538.

107. SET-OFF—Evidence.—In an equitable action to set off one judgment against another, evidence that plaintiff had in his hands book accounts of the defendant of sufficient value to pay off plaintiff's judgment is admissible, although the defendant has not pleaded payment or counterclaim.—UNION MERCANTILE CO. v. JACOBS, Mont., 50 Pac. Rep. 793.

108. SHERIFFS—Right to Ride on Freight Trains.—To give a sheriff the right to ride on freight trains in the performance of his official duties, "between stations where such trains stop," as provided in section 3375a, Rev. St., it is not necessary that such trains should regularly stop at such station, or be scheduled to stop there. It is sufficient if they are, in fact, stopping there at the time the sheriff gets aboard.—ALLEN v. LAKE SHORE & M. S. RY. CO., Ohio, 47 N. E. Rep. 1037.

109. SLANDER—Separate Utterances.—In an action for slander, defamatory words other than or similar to those set out in the complaint, spoken by defendant at other times and places, whether prior or subsequent to the bringing of such action, are admissible in evidence, without being pleaded to show malice, but are inadmissible in aggravation of damages.—BARKER v. PRIZER, Ind., 48 N. E. Rep. 4.

110. STATES, ADMISSION OF — Transfer of Pending Cases.—The Utah enabling act authorized the constitutional convention to provide for the transfer of pending cases to the proper State and federal courts. Accordingly it was provided in the State constitution that, in cases of concurrent State and federal jurisdiction, a transfer to the federal court should be made upon motion and bond, in default whereof the case should proceed in the proper State court: Held, that

where neither party sought a transfer, but after final judgment in a territorial court one of them took an appeal to the State supreme court, and the other joined in submitting it there for decision, this constituted an election to proceed in the State courts, and precluded the defendant from transferring the case to the federal court after a reversal and remand for a new trial.—HECHT v. METZLER, U. S. C. C., D. (Utah), 82 Fed. Rep. 340.

111. TAXATION—Surplus of Savings Bank.—When the surplus of a savings bank, under its charter and the laws of the State where it exists, belongs to its depositors, and though it is not payable at the same time with their deposits, and may be retained for a time to meet contingencies, the depositors or their representatives are ultimately entitled to the pecuniary benefit of it, such surplus is a debt due the depositors, and under Laws 1857, ch. 456, is not subject to taxation.—PEOPLE v. BARKER, N. Y., 47 N. E. Rep. 1103.

112. TAX LIEN.—Where two creditors of a common debtor, who is insolvent, each has, relatively to the other, the highest lien upon distinct parcels of real estate belonging to such debtor, and there are outstanding, against the latter, tax executions issued generally against him *in personam*, and binding both parcels of the realty, the burden of discharging the liens of these executions should, as a general rule, upon equitable principles, be apportioned between the two lien creditors, by making each of the two pieces of property liable ratably for its proportion of the whole amount of the taxes, according to the respective valuations at which the property was assessed and returned for taxation.—BROOKS v. MATLEDGE, Ga., 28 S. E. Rep. 119.

113. TAX SALES—Validity of Deed.—Under Pol. Code, § 3776, providing that the certificate of a sale for taxes must state "the name of the person assessed, the description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment," and section 3786, which requires that the tax deed shall recite the matters recited in the certificate of sale, a tax deed reciting "that said property was assessed according to law in the year A. D. 188— for the years 1888 and 1889," was void, because it did not recite the "year of the assessment."—SIMMONS v. MCCARTHY, Cal., 50 Pac. Rep. 761,

114. TRIAL—Right to Open and Close.—In an action on a note, defendant pleaded failure of consideration, and asked that he be allowed to assume the burden of proof. Plaintiff pleaded that he was an innocent purchaser, for value, before maturity, without notice: Held, that it was not an abuse of discretion to permit defendant to open and close the argument.—PERRY v. ARCHARD, I. T., 42 S. W. Rep. 421.

115. TRIAL—Misconduct—View by Jury.—Where the gist of an action on trial is the condition of the *locus in quo*, or where a view of it will enable the jurors the better to determine the credibility of the witnesses, or any other disputed fact, if, in such a case, jurors, without the permission of the court, or knowledge of the parties, examine the locality for the express purpose of acquiring such information, their verdict will be set aside, unless it is clear that such misconduct could not have affected their verdict. This rule must be given a reasonable operation, and not applied where there is only a possibility that the result was influenced by the alleged misconduct.—RUSH v. ST. PAUL CITY RY. CO., Minn., 72 N. W. Rep. 733.

116. TRUSTS—Completion.—A trust in favor of "children now living, or that may hereafter be born," of a woman, will last during the woman's life, as the law supposes a possibility of issue as long as a woman shall live.—BEARDEN v. WHITE, Tenn., 42 S. W. Rep. 476.

117. TRUST—Resulting Trust.—There is no resulting trust in favor of a wife in land purchased with her money, where title is taken in the husband's name at her request.—HENDERSON v. BANIEL, Tenn., 42 S. W. Rep. 470.

118. VENDOR'S LIEN.—Where land is conveyed by absolute deed, no vendor's lien exists, in the absence of express agreement of the parties.—SMITH v. ALLEN, Wash., 50 Pac. Rep. 783.

119. VENDOR'S LIEN.—One who conveys and delivers possession of land retains an equitable lien thereon for the unpaid purchase money, though he takes no distinct agreement or separate security therefor, and the deed recites payment of the consideration in full.—MARSHALL v. MARSHALL, Tex., 42 S. W. Rep. 353.

120. VENDOR AND PURCHASER—Specific Performance.—Where the vendor did not own at the time of the sale all the land he contracted to convey, and delayed for more than two years to tender a deed, his prayer for specific execution of the contract was properly denied; there being a total failure on his part to show paper title, and a failure to satisfactorily establish a possessory title.—WHITE v. MORGAN, Ky., 42 S. W. Rep. 403.

121. WATERS—Riparian Rights—Diversion.—The fact that headgates, erected for the purpose of regulating the flow of water into a branch stream so as to preserve uniformity of volume for the use of successive mills along its banks, have for over 21 years been controlled by owners of the upper mill, without regard to the needs of the lower owners, does not give the former a prescriptive right to close the headgates, and divert the water into the main stream, whenever they do not require it for their own use, to the injury of the lower owners, who have had no notice of any claim of right to so interrupt the flow of water.—HUGHESVILLE WATER CO. v. PERSON, Penn., 38 Atl. Rep. 584.

122. WATER RIGHTS—Oral Transfer.—A settler in possession of government land, for which he has appropriated a water right, may transfer such land and water right by oral assignment, so that the transferee becomes his successor in interest in the water right, even though the transfer was without consideration.—WOOD v. LOWNEY, Mont., 50 Pac. Rep. 794.

123. WILLS—Perpetuities.—A bequest to G, to be held in trust by executors for her benefit, the interest thereon payable to her, and at her death the same to be continued to two certain minors, until they are each 25 years of age, when the sum is to be paid to them share and share alike, does not violate Civ. Code, § 715, prohibiting the suspension of the power of alienation beyond the existence of lives in being.—IN RE HENDY'S ESTATE, Cal., 50 Pac. Rep. 753.

124. WILLS—Sale of Infants' Real Estate.—Under a devise by a testator to his wife of all his estate, "to do with it whatever she may think proper as long as she may remain single and lives, and after her death to my children who may be living, or the legal heirs of them who may die, to them and their heirs forever," the widow takes only a life estate, with power to use, manage, and control it in any way she thinks proper while she lives and remains single, remainder to the children.—LOEB v. STRUCK, Ky., 42 S. W. Rep. 401.

125. WITNESSES—Privileged Communications—Physicians.—In an action against a city for injuries caused by a defective sidewalk, evidence of plaintiff's physicians regarding her condition, and the information obtained while treating her, when called as witnesses for defendant, is within the prohibition of Code 1873, § 3643, providing that no physician shall be allowed to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice. — BAXTER v. CITY OF CEDAR RAPIDS, Iowa, 72 N. W. Rep. 790.

126. WITNESSES — Transactions with a Decedent. — Where a husband buys land, and has it deeded to his wife without her knowledge, there is no personal transaction between him and her, within Code 1873, § 3639, providing that no party can be examined as to any personal transaction or communication between him and a person at the time of such examination deceased, etc.—HAGAN v. POWERS, Iowa, 72 N. W. Rep. 771.

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